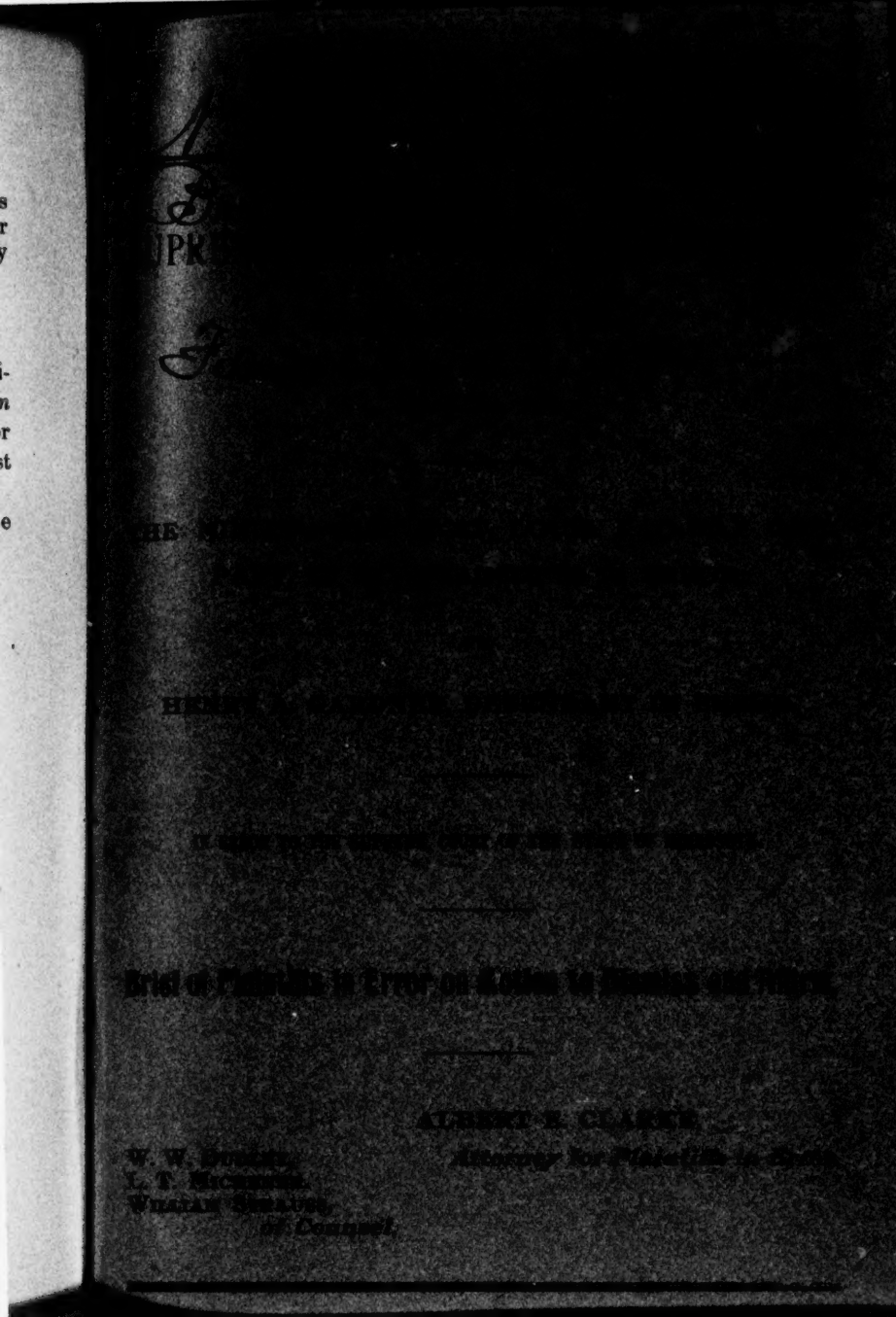

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of Counsel.

SUPREME COURT OF THE UNITED STATES.

October Term, 1898

Term No. 607.

THE MINNEAPOLIS & ST. LOUIS RAILWAY COMPANY, ET AL., PLAINTIFFS IN ERROR,

vs.

HENRY A. GARDNER, DEFENDANT IN ERROR.

IN ERROR TO THE SUPREME COURT OF THE STATE OF MINNESOTA.

BRIEF FOR PLAINTIFF IN ERROR UPON MOTION TO DISMISS WRIT OF ERROR AND TO AFFIRM THE JUDGMENT.

Statement.

The Territory of Minnesota, by an act of its Legislative Assembly, approved March 3d, 1853, and various acts amendatory thereof, created aud incorporated the Minnesota Western Railroad Company.

Subsequently, by legislative authority, the corporate
2 name was changed to the Minneapolis & St. Louis Railway Company.

The Constitution of Minnesota was framed August 29th, 1857, adopted by a vote of the people October 13th, 1857, and the State admitted May 11th, 1858.

Section 2, Article 10, of the State Constitution provides that "no corporation shall be formed under special acts except for municipal purposes."

Section 3 of said Article 10 provides that "each stockholder in any corporation (except those organized for the pur-

pose of carrying on any kind of manufacturing or me-
3 chanical business) shall be liable to the amount of stock held or owned by him."

The State Legislature, by a special act approved March 2d, 1881, entitled "An act to amend an act entitled an act to amend an act entitled an act to incorporate the Minnesota Western Railroad Company, approved March third (3), one thousand eight hundred and fifty-three (1853), and the acts amendatory thereof, approved February fourth (4th), one thousand eight hundred and seventy (1870)," authorized the Minneapolis & St. Louis Railway Company to consolidate its capital, franchises and property with the capital stock,
4 franchises and property of any other railroad company or companies organized under the laws of the State of Minnesota, or under the laws of any other State or Territory within the United States, in the construction of whose lines the said Minneapolis & St. Louis Railway Company had aided, or whose lines of railroad then were, or should be at the time of such consolidation. held under lease by said Minneapolis & St. Louis Railway Company.

Section Twelve of said Special Act provides that "upon the consummation of said act of consolidation as aforesaid, all and singular the rights, privileges, exemptions and
5 franchises of each of said corporations, parties to the same * * * shall be taken and deemed to be transferred to, and vested in such new corporation without further act or deed."

Section Fourteen of the act provides that:—

"All provisions of the general laws of this State in regard to railroad corporations shall be applicable to any new corporations formed by consolidation under the provisions of this act, except so far as the same shall not be applicable thereto by reason of the situation of portions of its lines without this State, PROVIDED, THAT NEVERTHELESS, THE PRIVILEGES,
6 FRANCHISES, EXEMPTIONS AND IMMUNITIES HITHERTO GRANTED TO THE MINNEAPOLIS & ST. LOUIS RAILWAY COMPANY SHALL CONTINUE TO AND BE VESTED IN SUCH NEW CORPORATION WITH THE SAME EFFECT AS IF ORIGINALLY GRANTED THERETO, and that such new corporation may at any time hereafter be consolidated with any other railroad company or companies in the same manner and with the same effect as is by this act provided."

The Minneapolis & St. Louis Railway Company accepted the act of 1881 and entered into a consolidation agreement during that year with the Minneapolis & Duluth Railroad Company, the Fort Dodge & Fort Ridgely Railroad
7 Company, and the Minnesota & Iowa Southern Railroad Company.

The Minneapolis & Duluth Railroad Company was a cor-

poration created under the same charter as the Minneapolis & St. Louis Railway Company, by authority of the Legislature of Minnesota. It was a corporation within the Minneapolis & St. Louis Railway Company, and is conceded to be subject to the same conditions as to liability of its stockholders as the last named company.

The Fort Dodge & Fort Ridgely Railroad Company and the Minnesota & Iowa Southern Railroad Company were both corporations of the State of Iowa, and by the terms of
8 their respective charters their stockholders were exempt from personal liability for corporate debts.

On December 27th, 1887, Revilo F. Parshall recovered a judgment against said Minneapolis & St. Louis Railway Company for personal injuries, in the sum of $8,719.10, which was duly docketed in the office of the Clerk of the Circuit Court of the United States, District of Minnesota, and was subsequently assigned to the defendant in error, Henry A. Gardner.

On July 28th, 1888, said Minneapolis & St. Louis Railway Company was by a court of competent jurisdiction adjudged to be insolvent, and has at all times since that date been
9 without assets from which said judgment could be collected.

The plaintiffs in error, William L. Bull, August Belmont, Edwin Hawley, Richard B. Hartshorne, F. B. Olcott, W. A. Read, William Strauss, J. Kennedy Tod and William D. Washburn, are stockholders in the insolvent corporation, the Minneapolis & St. Louis Railway Company.

This action was brought in the State court in accordance with the practice and statutes of Minnesota, to recover the amount of the judgment from the individual stockholders, and is a proceeding to enforce the constitutional liability of stockholders.

Said stockholders answered, among other things, to the complaint in said suit, that they severally deny that
10 they are, under the constitution and laws of the State of Minnesota, liable to contribute to the payment of said judgment a sum equal to the par value of the shares of stock held by them individually, or any other sum, amount or proportion. That the Minneapolis & St. Louis Railway Company was incorporated prior to the adoption or enactment of the constitutional provisions and statutes referred to. That the liability of the stockholders of said Minneapolis & St. Louis Railway Company was fixed by said act of incorporation and not otherwise; and that the constitutional provisions and laws referred to in the complaint are not applicable to or binding upon them.

11 It was urged upon the trial of said cause, both in the

District and Supreme Courts of the State of Minnesota, that Section 3, Article 10, of the State Constitution, imposing upon stockholders a personal liability for corporate debts, is in violation of Section 10, Article 1, Constitution of the United States, in that the provision of said Section 3, Article 10, impairs the obligation of the charter contract contained in Chapter 66, Special Laws of 1853, Territory of Minnesota, and amendatory acts.

It was also urged that Section 3, Article 10, if the State Constitution violates the Fourteenth Amendment to the Constitution of the United States, in that the State of Min-
12 nesota, by and through the provisions of said Section 3, Article 10, of the State Constitution, assumes to impair and destroy rights previously vested in said defendants by the charter of said railway company.

The Supreme Court of the State of Minnesota, by its final judgment in this action, rendered on the 26th day of August, A. D. 1898, decided, adjudged and determined as follows:

"The Minneapolis & St. Louis Railway Company is not the same corporation that was created by the Territorial act of 1853, entitled 'An act to incorporate the Minnesota Western Railroad Company,' but a new corporation created and organized under Special Laws of
13 1881, Chapter 113, and hence the stockholders were subject to the personal liability imposed by the Constitution, Section 3, Article 10.

"Having accepted the benefits of the act of 1881 by organizing, issuing stock and doing business as a corporation under it, the stockholders are estopped from asserting the unconstitutionality of the act."

In other words, the Supreme Court of Minnesota held that, by the consolidation of the railroad companies hereinbefore enumerated, a new corporation was created. That, notwithstanding the act of 1881, under which said consolidation was had, and the General Law of the State, expressed, and in terms preserved, continued and perpetuated all fran-
14 chises, privileges, exemptions and immunities originally vested in the original corporation created by act of the Territorial Legislature in 1853; the immunity or exemption of its stockholders from personal liability for corporate debts thus guaranteed and preserved, was taken away *by the constitutional provision adopted in 1857.*

ASSIGNMENT OF ERRORS.

The plaintiffs in error respectfully submit that the Supreme Court of Minnesota erred in this:

I.

The Court erred in holding that Section 3 of Article 10 of the Constitution of the State of Minnesota, which provides that "each stockholder in any corporation (except those organized for the purpose of carrying on any kind of mechanical or manufacturing business) shall be liable to the amount of stock held or owned by him," is valid, and imposes a personal liability for corporate debts upon the individual plaintiffs in error as stockholders of the corporation plaintiff in error, and that such constitutional provision does not impair the obligation of the contract between the State of Minnesota and the plaintiffs in error embodied in and evidenced by the special act of the Legislative Assembly of the Territory of Minnesota, approved March 3d, 1853, entitled "An act to incorporate the Minnesota Western Railroad Company," the benefits of which act were vested, continued and perpetuated in the plaintiffs in error by the special act of the Legislature of the State of Minnesota, approved March 2d, 1881, entitled "An act to amend an act entitled an act to amend an act entitled 'An act to incorporate the Minnesota Western Railroad Company,' approved March 3d, 1853, and the acts amendatory thereof, approved February 4th, 1870," and is not in conflict with the provisions of Section 10, Article 1, of the Constitution of the United States, which declares that no State shall pass any law impairing the obligation of contracts.

II.

The Court erred in holding that Section 3 of Article 10 of the Constitution of the State of Minnesota is not violative of the Fourteenth Amendment to the Constitution of the United States, in that the State of Minnesota, by the provisions of said Section 3, assumes to impair and destroy rights vested in the plaintiffs in error by the special act of the Legislative Assembly of the Territory of Minnesota, approved March 3d, 1853, entitled "An act to incorporate the Minnesota Western Railroad Company," and by the special act of the Legislature of the State of Minnesota, approved March 2d, 1881, entitled "An act to amend an act entitled an act to

amend an act entitled 'An act to incorporate the Minne-
18 sota Western Railroad Company,' approved March 3d,
1853, and the act amendatory thereof, approved Febru-
ary 4th, 1870."

III.

The Court erred in holding that the enforcement against the plaintiffs in error of the provisions of Section 3, Article 10, of the Constitution of the State of Minnesota, which declares that each stockholder in any corporation shall be liable to the amount of stock held or owned by him, is not in violation of Section 10, Article 1, of the Constitution of the United States, in that it impairs the obligation of the contract between the State and the plaintiffs in error, which is embodied in and evidenced by the act of the Legisla-
19 ture of the State of Minnesota, approved March 2d, 1881,
the same being and constituting Chapter 113 of the Special Laws of Minnesota, enacted in the year 1881.

IV.

The Court erred in holding that the contract of consolidation between the Minneapolis & St. Louis Railway Company, the Minnesota and Iowa Southern Railroad Company, the Minneapolis & Duluth Railroad Company and Fort Dodge & Fort Ridgely Railroad Company, pursuant to Chapter 113 of the Special Laws of 1881, approved March 2d, 1881, created a new corporation.

PROPOSITIONS ASSERTED BY PLAINTIFFS IN ERROR.

20 The defendant in error moves for a dismissal of the writ and an affirmance of the judgment of the State court, on the ground that the record does not present a Federal question.

We preface the argument of this motion by a statement of the following propositions:

1. Prior to the adoption of the State Constitution, stockholders in the original corporation created by the Territorial act of March 3d, 1853, were exempt from personal liability for corporate indebtedness.

2. Prior to consolidation under the act of March 2d, 1881, the stockholders in each of the constituent companies
21 were exempt from personal liability for corporate indebtedness.

3. It is immaterial whether the present company is the original Minneapolis & St. Louis Railway Company, chartered in March, 1853, and in which the other constituent companies are merged by the consolidation agreement, or a new corporation created by such agreement.

If it is identical with the original company its stockholders are exempt, because its charter contract is older than the constitution which assumes to impose the liability.

If it is a new corporation created by the consolidation agreement pursuant to the act of March 2d, 1881, the
22 stockholders are exempt from personal liability, for the following reasons:

(a) It is the settled law of Minnesota, declared by its highest court, that its Legislature may transmit *existing* franchises, immunities and exemptions already vested in one corporation, to a *new corporation*, and this may be done notwithstanding the Legislature might be powerless to grant *new* franchises of the same class to such corporations at the date of such transmission.

(b) The Legislature of Minnesota has exercised this power and specifically vested in the consolidated company, *first*, all the franchises, privileges and immunities of each of the constituent companies; and *second*, the particular
23 franchises, privileges, exemptions and immunities

granted to the Minnesota Western Railroad Company by the Territorial Legislative Assembly of 1853.

(c) By the General Laws of the State, in force at the time of the consolidation, all the franchises, privileges, immunities and exemptions of each constituent company vested in the new corporation without impairment, change or diminution.

4. By the acceptance of the special act of 1881, and the execution of the consolidation agreement pursuant to its provisions, that act became a contract, binding alike upon the corporation and the State.

5. As the Legislature, by the act of March 2d, 1881, and by the General Statutes, specifically continues to and
24 perpetuates in the present company all the franchises, privileges, exemptions and immunities of each constituent company,—and as the stockholders of each were, at the time of consolidation, exempt from personal liability for corporate indebtedness,—and as the act constitutes a valid contract between the plaintiffs in error and the State, it follows that the contract is violated and its obligations impaired by the enforcement of the constitutional liability.

6. If the special act of March 3d, 1881, created a new corporation in violation of Section 2, Article 10 of the State Constitution, and is void, the stockholders are exempt from personal liability under the charters of the constituent
25 companies. They are not estopped to assert the unconstitutionality of the act.

7. As the special act of the Legislature, pursuant to which the consolidation agreement was entered into, was not construed by the State court before the consolidation agreement was made, this court is not bound by the construction of the State court, but will construe the act and the contract made in pursuance thereof independently.

Does the Record Present a Federal Question?

I.

The charter of the Minneapolis & St. Louis Railway Company was granted by the Legislative Assembly of the Territory of Minnesota by special act, approved March 3d,
26 1853, the corporate name then being the "Minnesota Western Railroad Company." This act, which constituted the original contract between the Territory on the one side and the corporation and its stockholders on the other side, is set forth in full on pages 41 to 46 of this brief.

Neither the charter nor the general law of the Territory imposed upon stockholders in the corporation thus created, personal liability for corporate debts.

The statutes being silent, no personal liability existed. When a State or Territory grants to individuals the right to exercise corporate powers, such individuals and the corporation thus created, by accepting the grant, become in-
27 vested with every right, privilege, franchise, exemption and immunity granted in terms, or existing by necessary implication under general or special laws.

In *Cook on Stock and Stockholders, Secs. 212, 213,* the law is stated as follows:

"Probably the most characteristic feature of a corporate existence is the fact that, by being a corporation, its stockholders are liable only for the par value of the stock held by them, and when that is once paid in money or property, there is no further liability. *This exemption from liability need not be declared in the charter,*
28 *but arises from the very fact of incorporation.*

"For this reason, legislatures are very careful in giving joint stock companies special powers, to distinctly declare that the company shall not thereby become a corporation. *The very fact of incorporation, by itself releases subscribers for stock from all liability for corporate debts, except to the extent of their unpaid subscriptions.*

"It has been deemed wise, however, by the State Legislatures in many instances to increase the liability of stockholders to corporate creditors; accordingly, statutes are passed expressly declaring that the stockholders shall be liable for a specified sum in addition
29 to their unpaid subscriptions; this is called the statutory liability of stockholders. It rarely exists as regards stockholders in railroad corporations, but frequently exists in the case of manufacturing and various other corporations, and nearly always exists as against the stockholders in banks.

"This additional liability may be imposed by the State Constitution or by the charter, or by a general statute. Where this liability is imposed by a provision existing at the time of the creation of a corporation, there is no doubt of its constitutionality, but where the liability is created by a statute or constitutional provision enacted
30 after the corporation was incorporated, then there arise difficult questions of constitutional validity."

In *United States vs. Estate of Leland Stanford, 161 U. S. 429*, Mr. JUSTICE HARLAN says:

"As the stockholder of a corporation is not liable beyond the amount of his unpaid subscription, for its debts, unless such liability is imposed by statute, and as the acts of Congress are silent upon that subject, every subscriber to the stock of the Union Pacific Railroad Company must be deemed to have become such *upon the condition, implied by law, that he should not be personally liable for the debts of the corporation.*"

The law, as it existed at the time the charter was granted, entered into and became a part of the charter contract,
31 and the rights of the interested parties are to be determined by the laws in force at the time the charter was granted.

Hillebert vs. Porter, 28 Minn., 497.
Bronson vs. Kinzie, 1 Howard, 311-314 (14 Curtis, 631-2).

In *Von Hoffman vs. City of Quincy, 4 Wallace, 550*, it is said:

"It is also settled that the laws which subsist at the time and place of the making of a contract, and where it is to be performed, enter into and form a part of it as if they were expressly referred to or incorporated in its terms. This principle embraces alike those which affect its validity, construction, discharge and enforcement."

32 In *Walker vs. Whitehead, 16 Wallace, 317, 318*, Mr. JUSTICE SWAYNE said:

"The laws which exist at the time and place of the making of a contract, and where it is to be performed, enter into and form a part of it. This embraces alike those which affect its validity, construction and enforcement;

Nothing is more material to the obligation of a contract than the means of its enforcement. The ideas of validity and remedy are inseparable, and both are parts of the obligation which is guaranteed by the constitution against impairment;

The obligation of a contract 'is the law which binds the parties to perform that agreement.' Any impairment of the obligation of
33 a contract—the degree of impairment is immaterial—is within the prohbition of the constitution;

The States may change the remedy, *provided no substantial rights securedby the contract is impaired.* Whenever such a result is produced by the act in question, to that extent it is void. The States are no more permitted to impair the efficacy of a contract in this way than to attack its vitality in any other manner. Against all assaults coming from that quarter, whatever guise they may assume, the contract is shielded by the constitution. It must be left with the same force and effect, including the substantial means of en-
34 forcement, which existed when it was made; the guarantee of the constitution gives it protection to that extent."

This Court said, in *McCracken vs. Hayward, 2 Howard, 608 (15 Curtis, 231)*:

"The obligation of a contract consists in its binding force on the

party who makes it. This depends on the laws in existence when it is made; these are necessarily referred to in all contracts, and forming a part of them as the measure of the obligation to perform them by the one party, and the right acquired by the other."

See also *Barnitz vs. Beverley, 163 U. S., 127*, which holds that all the laws of the State existing when the contract is made, which affect the rights of the parties to the con-
35 tract, enter into and become a part of it, and are obligatory on all courts which assume to give a remedy on such contracts.

The contract thus implied is protected by the Federal Constitution as fully as if affirmatively expressed in the charter.

Fisk vs. Jefferson Police Jury, 116 U. S., 134.

These authorities dispose of the technical objection that the immunity was not affirmatively *granted*, suggested by defendant in error.

The Supreme Court of Minnesota, in *Robertson vs. Sibley, 10 Minn., 323 (Gil. 253-256)*, said that personal liability of stockholders for corporate debts did not exist prior
36 to the adoption of the State Constitution. The ruling was not, however, necessary to the decision of the case. *Such immunity is a franchise.*

Given vs. Wright, 117 U. S., 656.
Stevens vs. Railway Co., 36 Minn., 471.

And is personal to the stockholders.

A charter provision exempting a corporation from taxes exempts stockholders from assessment of their stock for taxation; and a subsequent provision of a State Constitution providing for taxation of shares of stock is, *as to the stockholders*, in violation of the Federal Constitution, because it impairs the obligation of the charter contract.

37 *Gordon vs. Appeal Tax Court, 3 How., U. S. 133.*
United States vs. Estate of Leland Stanford, 161 U. S., 429.
Dodge vs. Woolsey, 18 Howard, 331, 359.

Clearly the grant of corporate powers and corporate rights carried to the stockholders the attendant immunity from personal liability under existing laws; and, in the further discussion of this motion, it will be assumed by the plaintiffs in error that, under the charter of 1853, stockholders in the corporation thereby created were exempt from personal liability for corporate debts. This proposition is neither controverted nor questioned by the State court.

38 II.

Prior to the consolidation, which became effective June 1st, 1881 (page 28, folio 53, Record), pursuant to the provisions of Chapter 113, Special Laws of 1881, approved March 2d, the stockholders of each and all of the constituent companies were exempt from personal liability for corporate indebtedness.

This exemption of the stockholders of the original Minneapolis & St. Louis Railway Company resulted from the fact that its charter was older than the constitutional provision which assumes to impose the liability.

The Minneapolis & Duluth Railroad Company was an
39 organization of holders of special stock of the Minneapolis & St. Louis Railway Company, pursuant to Section 5 of Chapter 57 of the Special Laws of Minnesota for the year 1870, said act being an amendment to the original charter act of March 3d, 1853. (Page 47 of this brief.)

The agreement under which it was created is found in the printed record at page 65, being "Exhibit 1." Its organization is under the charter of the Minneapolis & St. Louis Railway Company, of which it formed a part.

The Fort Dodge & Fort Ridgely Railroad Company and the Minnesota & Iowa Southern Railroad Company were Iowa corporations. At the date of their creation the laws of
40 that State authorized the incorporators of railroad companies to exempt the stockholders from personal liability for corporate debts, by embodying in the articles of incorporation an article or provision declaring such exemption.

See Additional Stipulation of Facts, page 64, Record.
See also Iowa, Code of, 1873, Sec. 1062, sub-div. 7, page 184.

The charter of each of said companies contained an article or section declaring the exemption.

See Articles of Incorporation of the Minnesota & Iowa Southern Railroad Company, page 73 of Record, Art. 9.
Articles of Incorporation of the Fort Dodge & Fort
41 *Ridgely Railroad Company, page 75 of Record, Art. 7.*

It is clear that the stockholders of each of the several companies entering into the consolidation agreement were exempt from personal liability for corporate debts.

III.

The Legislature of the State of Minnesota had power, under the State law, to transmit the franchises, privileges and immunities of the original corporation to a new corporation.

If the consolidation agreement did not create a new corporation, the franchises, exemptions, privileges and immunities of each constituent company were continued; the only limitation being that, unless it be clear that the Legis-
42 lature intended to extend such franchises, exemptions, privileges or immunities of each and all the constituent companies to the consolidated company, they will be limited to the company to which they were granted, and the property of each corporation and the stockholders in each corporation must be answerable according to the law under which such corporation was created.

Central R. R. Co. vs. Georgia, 92 U. S., 665.

As the stockholders of all the constituent companies were exempt from personal liability, the exemption would, under this rule, extend to all the stockholders of the consolidated company.

43 *If a new corporation was created by the consolidation, as was held by the Supreme Court of Minnesota, the franchises of the constituent corporations either passed to the new corporation or vested in the State, which could lawfully confer them upon the new corporation.*

This rule is asserted by the highest court of Minnesota in

First Division of the St. Paul & Pacific R. R. Co. vs. Frank M. Parcher et al., 14 Minn., 297 (Gil. Ed. 224).

The Supreme Court of the State held in that case that a transfer of existing franchises is not in violation of that section of the constitution which provides that no corpora-
44 tion shall be formed under special acts except for municipal purposes.

I quote from the opinion of the Court on pages 234-235:

"But it is urged that the act transcends the power of the Legislature, because it attempts to form a corporation by a special act, in violation of Section 2, Article 10, of our Constitution.

Whatever may be the meaning of the constitutional inhibition referred to, we are of the opinion that it does not forbid such legislation as was had in this instance. There was no attempt here to create *a new corporate franchise*, and thus to form and bring into existence for the first time, that which is the very essence of a corporation,
45 and without which a corporation is nothing; but corporate franchises *already in existence*, and held by the State as property,

without merger, in its general sovereignty, and without extinguishment, were *transferred* to the persons enumerated in the act. *This, we think, was a legitimate and constitutional transaction.*"

The Supreme Court of Minnesota has gone to the extreme in asserting the right of a Legislature to transmit and enlarge franchises granted by special act, without violation of the constitutional provision.

In *Green vs. Knife River Falls Boom Co., 35 Minn., 155*, it was definitely settled that in Minnesota, a charter of a corporation, whether organized under a general statute or
46 by special charter, may be amended to the extent of conferring on it new and enlarged powers not granted by the original charter, even if the effect of the amendment provides to change the charter, the business and the object of the corporation; and that such amendment is not a violation of the constitution.

See also *Ames vs. Railroad Co., 21 Minn., 241.* The opinion upon rehearing, by which the former decision was overruled, commences on page 281.

City of St. Paul vs. St. Paul & Sioux City R. R. Co., 23 Minn., 469.

In *Huff vs. Winona & St. Peter R. R. Co., 11 Minn., 180 (Gil. 114)*, it is held that franchises granted to one corporation by special act may be transmitted by act of the
47 Legislature to a *new corporation*, and that the transfer is valid. The Court says (p. 124) of corporations:

"This artificial being may be dissolved or may in some other way forfeit its franchises, and the State, under such circumstances, may permit them to merge, and thus become extinguished, or may revive the old corporation and again confer upon it the same franchises, *or it may grant them to a different corporation.*"

The State may continue the immunities of the original corporation to a new one, by reference to the original act.

Railroad Company vs. Maine, 96 United States, 499, 510.
The Binghampton Bank, 3 Wallace, 51.

It is, and was at the time the consolidation agreement was made and became effective, *the statute law* of
48 Minnesota that the rights, franchises and immunities of existing railroad corporations might, *by consolidation*, be vested in a *new corporation.*

Chapter 94 of the General Laws of Minnesota for 1881, approved March 3d, 1881 (printed in full on page 19 of this brief), provides for a consolidation of railroad corporations, either domestic or foreign, whether organized under the general law or special charter. After reciting the steps neces-

sary to complete a consolidation, Section 2 of the act declares that "the said corporations shall become merged in the *new corporation* provided for in said articles," and that the "new corporation" shall "succeed to all the rights, powers,
49 franchises, contracts, privileges, immunities, liabilities, obligations and duties, liabilities to or exemption from taxation, commutations, property, real, personal or mixed, and things in action, as fully in all respects as the same were possessed by such old corporation or corporations at the time of such consolidation, under the laws of this State; and such *new corporation* shall hold and enjoy the same, and all and every part thereof, without impairment or change, *as fully and in the some manner and to the same extent as if the said consolidation had not taken place.*"

This general act affirms and determines the *power* of the State to transfer existing franchises to a new corpora-
50 tion. This power was exercised in favor of the plaintiffs in error, by the special act passed at the same session vesting in and continuing to it the immunity of the constituent corporations.

Argument of the question whether the consolidation created a "new corporation" is largely a play upon words. Existing franchises may be conferred upon a new corporation, and their existence continued, as fully as if they were still vested in the corporation to which they were first granted. This proposition is asserted, and affirmed by statutory enact-
ment in Minnesota, and by the decision of the highest
51 court of the State. There is no question of *power;* the question is purely one of *intent.* If it was the intent and purpose of the State Legislature to confer, transmit or continue the franchises and immunities created by the charter act of 1853 to the present consolidated corporation, it is entirely unimportant whether such consolidated corporation is "a new corporation" or a consolidation of old ones. The holding that it is "a new corporation" decides nothing material to the issue in this case. If the franchises which give life to this corporation were created by the act of 1881, the con-
52 stitutional liability applies; if created in 1853, it does not apply. The question in this case is this:

Did the Special Act of March 2d, 1881 create or assume to create NEW FRANCHISES?

IV.

The Legislature of Minnesota did transfer, transmit and continue to the new corporation created by the consolidation, all the franchises, privileges, immunities and exemptions of each constituent company. It did this both by general and special legislation.

By the terms of the consolidation agreement entered into by the several railroad companies, each company *granted, bargained, sold, transferred* and *set over* to the
53 new corporation all the rights, franchises, privileges and immunities of each constituent corporation.

See paragraphs 3 and 4 of Consolidation Agreement, page 29, Printed Record.

Section 69, Chapter 34, of the Minnesota General Statutes of 1878 provides, among other things, that

"Any railroad corporation may lease *or purchase* any part or all of any railroad constructed by any other corporation whose lines of road are continuous or connected with its own, upon such terms and conditions as may be agreed upon."

Chapter 94, General Laws of Minnesota, 1881, ap-
54 proved March 3d of that year, provides that

"Any railroad corporation, either domestic or foreign, whether organized under a general law or by virtue of a special charter, may *lease or purchase, or in any way become owner of, or control the stock of* any other railroad corporation, when their railroads can be lawfully connected and operated together so as to form one continuous main line, with or without branches."

This law was in force at the time the consolidation agreement became effective, June 1st, 1881.

The whole of said act (Chapter 94, Gen. Laws of 1881) will be found on page 19 of this brief.

The lines of the constituent corporations form a continuous main line.

55 The Minneapolis & Duluth Railroad (which was, when constructed, a part of the Minneapolis & St. Louis Railroad, as hereinbefore explained) extended from White Bear Lake to the City of Minneapolis, where it connected with the main line of the last named railroad company.

(See Exhibit A, page 25, Printed Record, folio 48.)

The line of the Minneapolis & St. Louis Railway extended from Minneapolis to the Iowa State line, where it connected with the railroad of the Minnesota & Iowa Southern Railroad Company. (See Exhibit A, page 25, Printed Record, folio 47.)

The railroad of the Minnesota & Iowa Southern Railroad Company extended from the Iowa State line to Liver-
56 more, Iowa, where it connected with the railroad of the Fort Dodge & Fort Ridgely Railroad Company. (See Exhibit A, page 26, Printed Record, folio 49.)

The sale of the property, stock and franchises of each

constituent company to the new corporation was fully authorized by the State law.

There is a conflict of authority as to whether an immunity passes by sale or consolidation, but, in Minnesota, the question is settled in the affirmative.

It was held by the Supreme Court of Minnesota, in *First Division, etc., R. R. Co. vs. Parcher, 14 Minn., 297* (page 224, Gilfillan Edition), that an exemption or immunity is a *contract right* and passes by a sale of the corporate property.

57 In that case the question was whether the purchaser of a railroad at foreclosure sale took, by the sale, an immunity from taxation, which constituted one of the corporate franchises.

On pages 252-3 (Gilfillan Edition) the Court says:

"It is further contended that this immunity from taxation was conferred upon the Minnesota & Pacific Railroad Company personally (so to speak), and for its benefit only, and that it did not pass to the State by the foreclosure and forfeiture. It may admit of some doubt whether the rights conferred upon the company in respect to taxation are not franchises in the authorized sense of the term.

If these rights are franchises, there is no reason apparent why the State did not acquire them with the other franchises of the com-
58 pany, by virtue of the foreclosure and forfeiture. And even admitting that this immunity or privilege was originally personal to the Minnesota & Pacific Railroad Company, under the provisions of its charter, it was by virtue of the amendment to the constitution, and not by an act of ordinary legislation, permitted to be made the subject of mortgage, and therefore transferrable to the purchaser at mortgage sale.

We are, however, of opinion that this privilege or immunity in reference to taxation is in no greater degree personal to the Minnesota & Pacific Railroad Company than any other of its rights or franchises.

59 All the franchises and rights conferred upon the company were granted for the benefit of the company, and in that sense were all personal. But we perceive nothing in the language employed in reference to this right, privilege or immunity to distinguish it, in this respect, from the other rights granted. It would certainly be one of 'the privileges, grants, franchises, immunities and advantages,' the sale and transfer of which is authorized by the provisions of Section 21 of the original charter of the company.

But if this immunity from taxation be not a franchise, in the legitimate meaning of the word, it certainly was, as we have already
60 determined, a right and a contract right, to hold the lands exempt from taxation until the same were sold and conveyed. And as it was not a personal and inalienable right, there is no reason why it would not pass with the lands, and as appendant thereto, to the State. When the Minnesota & Pacific Railroad Company lost the lands it lost this right, for it had lost that to which this right related. The question then is, what became of the right? The State took and held what it acquired, not in its sovereign character, but as property, like a private individual; and in this capacity it succeeded to the roads, lands and franchises of the company, and in our opinion to this
61 immunity from taxation as appendant to the lands. If this was not the case, then this immunity was merged or extinguished. That it was not the intention or interest of the State to suffer it to be merged or extinguished, but to hold and transfer it for the purpose of

facilitating and hastening the construction of the road, is, we think, apparent, for the reasons which we have before advanced, for the purpose of showing that the State took, held and transferred the corporate and other franchises of the company, unmerged and unextinguished."

Whatever may be the law in other jurisdictions, such is the settled law of Minnesota.

62 V.

It has been the law of Minnesota ever since the State was admitted into the Union that railroad companies might consolidate without loss of corporate rights or privileges.

Minnesota was admitted on May 11th, 1858. Ninety-one days thereafter, to-wit, on August 12th of the same year, Chapter 70 of the General Laws of 1858 was approved. Subdivision 1 of Section 21 of that act reads as follows:

"Any two or more railroad corporations may, by their directors, enter into an agreement, under the corporate seal of each, for the consolidation of the said two or more corporations, prescribing
63 the terms and conditions thereof; the mode of carrying the same into effect; the name of the new corporation; the names and places of residence and number of the directors thereof, which shall not exceed fifteen; the time and place of holding the first election of directors; the number of shares of capital stock in the new corporation; the amount of each share, which shall not be less than one hundred dollars; the manner of converting the shares of capital stock in each of said two or more corporations into shares of capital stock of the new corporation; the manner of compensating stockholders in each of said two or more corporations, who refuse to con-
64 vert their stock into the stock of such new corporation; with such other details as they shall deem necessary to perfect such consolidation of said corporations: *and such new corporation shall possess all the powers, rights and franchises conferred upon such said two or more corporations*, and shall be subject to all the restrictions and perform all the duties imposed by the provisions of this act; Provided, that all stockholders in either of such corporations who shall refuse to convert their stock into the stock of such new corporation, shall be paid at least par value for each of the shares so held by them, if they shall so require, previous to said consolidation be-
65 ing consummated."

These provisions were continued, with little change in language, and none in effect, in Section 36 of Chapter 34 of the revision of 1866, page 269, and in Section 36, Chapter 34, of General Statntes of 1878.

On March 3d, 1881, and prior to the execution of the consolidation agreement, *Chapter 94 of the General Laws of Minnesota for 1881*, was duly approved and became a law. This chapter is as follows:

'CHAPTER 94.

An Act to authorize any railroad company to lease, purchase, or in any way become owner of, or to control, any other railroad corporation, or to consolidate therewith.

Be it enacted by the Legislature of the State of Minnesota:

SECTION 1. Any railroad company, either domestic or foreign, whether organized under a general law or by virtue of a special charter, *may lease or purchase, or in any way become owner of or control, or hold the stock of, any other railroad corporation, when their respective railroads can be lawfully connected and operated together, so as to constitute one continuous main line, with or without branches.*

SEC. 2. Any railroad corporation, whether organized under a general law or by virtue of a special charter of the State or Territory of Minnesota, or under the laws of any other State or States or Ter-
67 ritory, whose lines of railroad now or hereafter constructed within or without this State, can be lawfully connected and operated together to constitute one continuous main line, with or without branches, so as to admit of the passage of trains over them without break or interruption, *may consolidate their stock and franchises upon such terms as may be agreed upon, so as to become one corporation by any name by them selected.*

Articles stating the terms of consolidation shall be approved by each corporation by a vote of the stockholders owning a majority of the stock, in person or by proxy, at either a regular annual meet-
68 ing thereof or at a special meeting called for that purpose, by a notice of at least thirty (30) days, stating the object of such meeting, to be addressed to each of such stockholders, when their place of residence is known, and deposited in the postoffice, and published for at least three (3) successive weeks in one newspaper in at least one of the cities or towns in which each of said corporations has its principal business office, or by the consent in writing of a majority of such stockholders annexed to such articles: a copy of such articles of consolidation and of the record of such approval, or of such consent, accompanied by lists of the stockholders of said corporation, and
69 the number of shares held by each, duly certified by their respective presidents and secretaries, with the respective corporate seals thereto affixed of said corporations, shall be filed for record in the office of the Secretary of State of this State, and of the State or States or Territory by or under whose laws the said corporations, parties to such articles of consolidation, were created or exist, before any such consolidation shall have any validity or effect. Upon the filing for record of said copies the said corporations shall beceme merged in the new corporation provided for in said articles, to be known thereafter by the corporate name therein adopted, *and shall, within*
70 *this State, succeed to all the rights, powers, franchises, contracts, privileges, immunities, liabilities, obligations and duties, liabilities to or exemption from taxation, commutations, property, real, personal and mixed, possessed by such old corporation or corporations, at the time of such consolidation under the laws of this State; and such new corporation shall hold and enjoy the same, and all and every part thereof, without impairment or change, as fully in the same manner and to the same extent as if the said consolidation had not taken place.* Provided, that all rights of creditors, and all the liens upon the property of either
71 of said old corporations, shall be preserved unimpaired, and all the debts, liabilities and duties of either of said consolidated corporations shall thenceforth attach to said new corporation, and be enforceable to the same extent, and in the same manner, as if such debts, liabilities and duties had been originally incurred by it. Provided further, that all such corporations shall be subject to the laws of this State and the jurisdiction of the courts of this State, in the same manner and to the same extent as domestic corporations.

SEC. 3 No railroad corporation shall consolidate with, lease or purchase, or in any way become owner of, or control any other
72 railroad corporation, or any stock, franchises, rights of property thereof, which owns or controls a parallel or competing line.
SEC. 4. This act shall take effect and be in force from and after its passage.
Approved March 3, 1881."

The language which continues the immunities and exemptions "to the same extent as if said consolidation had not taken place," could not be made stronger, nor could the policy and purpose of the law be more clearly expressed. It applies in terms equally to corporations created by general laws or special act.

It is clear, therefore, that the Legislature did transfer and transmit all the franchises, exemptions, privileges and immunities of each constituent company to the new corpo-
73 ration by general law.

It also did so by special law.

The special act of March 3, 1881, which authorizes the consolidation, contains the following sections:

"SECTION 12. Upon the consummation of said act of consolidation as aforesaid, all and singular the rights, privileges, exemptions and franchises of each of said corporations, parties to the same, and all the property, real, personal and mixed, and all debts due on whatever account to either of said corporations, as well as all stock, subscriptions and other things in action belonging to either of said corporations, shall be taken and deemed to be transferred to and vested in such new corporation, without further act or deed; and all claims, de-
74 mands, property, rights of way, and every other interest, shall be as effectually the property of the new corporation as they were of the former corporations, parties to the said agreement and act; and the title to all real estate, taken by deed or otherwise, under the laws of this State, vested in either of such corporations, parties to said agreement and act shall not be deemed to revert or be in any way impaired by reason of this act, or anything done by virtue thereof, but shall be vested in the new corporation by virtue of such act of consolidation.

"SECTION 14. All the provisions of the General Laws of this State in regard to *railroad* corporations shall be applicable to any new
75 corporation formed by consolidation under the provisions of this act, except so far as the same shall not be applicable thereto by reason of the situation of portions of its line within this State; *provided, that nevertheless, the privileges, franchises, exemptions and immunities hitherto granted to the Minneapolis & St. Louis Railway Company shall continue to and be vested in such new corporation, with the same effect as if originally granted thereto;* and that such new corporation may at any time hereafter be consolidated with any other railroad company or companies, in the same manner and
76 with the same effect as is by this act provided."

The provisions of Section 11 of the act quoted by counsel, providing that the new *corporation* "shall be subject to the *restrictions* and duties imposed by the laws of the State," has no connection with or reference to the liability of stockholders. The constitutional provision does not impose a "restriction" or a "corporate duty."

The provisions of the general laws made applicable to the consolidated corporation are limited to those applicable to *railroad* corporations, as distinguished from corporations generally.

There are no less than three conclusive reasons why it should be held that the immunity from personal liability for corporate debts guaranteed to the stockholders of each and all of the constituent corporations by their several charters, is continued to, and vested in the stockholders of the con-
77 solidated corporation:

First: The Special Act of March 2, 1881, authorizing the consolidation, and pursuant to which the consolidation was made, specifically continues to and vests in the consolidated corporation and its stockholders all "*the rights, privileges, exemptions and franchises of each of said corporations*" (Sec. 12), and all the "*privileges, franchises, exemptions and immunities*" of the Minnesota Western Railroad Company, chartered in 1853 (Sec. 14).

Second: By Section 4 of the Consolidation Agreement the several constituent companies, in accordance with the law of the State, as set forth in Section 1 of Chapter 94 of
78 the General Laws of 1881, approved March 3, 1881, sold and conveyed all their "respective railways, properties and estates, real, personal and mixed, and their respective franchises, rights, easements, privileges, immunities and exemptions" to the consolidated company; and under the decisions of the Supreme Court of Minnesota such sale carried with it the immunity or franchise of personal exemption from liability for corporate debts.

Third: By the consolidation agreement, the corporation plaintiff in error, by virtue of the general laws of the State embodied in Chapter 94. General Laws of 1881, succeeded to "all the rights, powers, franchises, contracts, privileges
79 and immunities" of each constituent corporation, "*and all and every part thereof, without impairment or change, as fully, in the same manner and to the same extent, as if the said consolidation had not taken place,*" including the stockholders' immunity from personal liability. The purpose of the Legislature to preserve to this company all the benefits, of the general law is expressed in Section Fourteen of the Special Act, which makes all general laws "in regard to *railroad* corporations" applicable thereto; and at the same time, in order to guard against a possible lapse or loss of original charter rights, a proviso was added, declaring "nevertheless, the privileges, franchises, exemptions and immunities hitherto granted to the Minneapolis & St. Louis Railway Company shall continue to and be vested in

such new corporation, with the same effect as if originally granted thereto."

The general act of 1881 provided that corporations formed by consolidation under the provisions of that act "shall be subject to the laws of this State and the jurisdiction of the courts of this State, in the same manner and to the same extent as domestic corporations." It is doubtful whether this provision was intended to serve any other purpose than to extend generally the jurisdiction of the laws and courts of the State over such foreign corporations as should enter into the consolidation agreement. The fact that the language might be so construed as to affect existing franchises and immunities, furnishes the only reason for the enactment of the Special Act of 1881 authorizing the consolidation agreement in the case at bar. It is evident that the sole purpose of Section 14 of the Special Act was to construe the general law and to clearly and unequivocally express the intent of the Legislature to preserve the privileges, franchises, exemptions and immunities created and granted by the act of 1853 from impairment by any construction of the general statutes; otherwise this consolidation might have been made with equal advantage under the provisions of the general act.

VI.

The State of Minnesota is bound by the contract embodied in the act of March 3d, 1853, as amended by Chapter 113, Special Laws of 1881, approved March 2d, 1881, and it is for this Court to construe the contract, without regard to the decision of the State court.

The most favorable construction of this act which can be asked by the State, is that it be construed as the charter of the new corporation. Its title declares it to be an amendment to the charter of the Minnesota Western Railroad Company, which is identical with the original Minneapolis & St. Louis Railway Company; the change of name being authorized by Section 5 of Chapter 57 of the Special Laws of 1870.

Whether the act be construed as a new charter or an amendment to an existing charter, it is none the less a contract.

It is for this Court to construe this contract.

This is not a case where the construction of a State statute by a State court is binding upon this Court. That rule applies only to general statutes applicable to all citizens; to statutes which vest no absolute right, but vest only such rights as are subject to modification or rescission

at the will of the Legislature. In such cases the doings between the citizens and the Legislature are in the nature of legislation rather than compact, and may be modified or abolished. A charter granted by special act to a particular person or collection of individuals is a compact; a contract, to which the State is a party.

Where a suit involves rights under a contract affected by a State statute, and entered into before such statute has been construed by the State courts, a Federal court is not bound by a subsequent construction by the State courts, but will exercise an independent judgment.

Burgess vs. Seligman, 107 U. S., 33-34.
85 *Carroll County vs. Smith, 111 U. S., 562-3.*
Anderson vs. Santa Anna, 116 U. S., 362.
Pleasant Township vs. Ætna Life Ins. Co., 138 U. S., 72-73.

The consolidation agreement was entered into by the several railroad corporations under date of April 20, 1881, and became effective on June 1st of the same year. The Special Act of March 2d, 1881, under which the agreement was made, had not then been construed by any court, and is for the first time presented for construction in the case at bar.

The Circuit Court of the United States for Indiana held, in the case of *Central Trust Company of New York vs. Citizens Street Railway Co. of Indianapolis, et al., 82 Fed. Rep., 1,* that where the controversy concerns a contract, and the meaning of the contract depends upon the construction of a State statute, or a provision of a State constitution, a
86 decision on the meaning of said statute or constitutional provision by the highest court of a State, made after the contract was entered into and rights had vested thereunder, is not conclusive upon a litigant in a Federal court. The litigant in such case is entitled to the independent judgment of the National tribunal.

Whether there is a Federal question in this case depends largely upon the construction given the general and special acts of 1881.

In the case of *Louisville Trust Co. vs. City of Cincinnati, United States Circuit Court of Appeals, 76 Federal Reporter, 296, 301,* Lurton, Circuit Judge, states the rule as
87 follows:

"Where a contract or obligation has been entered upon before there has been any judicial construction of a State statute upon which the contract or obligation depends, by the highest court of the State, a Federal court obtaining jurisdiction of a question touching the validity, effect or obligation of such a contract will, while leaning to an agreement with the State court, exercise an independent judgment as to the validity and meaning of such contract, and will not necessarily

follow the opinion of the State court construing such statute, if such decisions were rendered after the rights involved in the contro-
88 versy originated."

It is for this court to determine, independently of the adjudications of the State court, *whether there exists a contract*, within the protection of the Federal constitution.

Jefferson Branch Bank vs. Skelley, 1 Black, 436.
Wright vs. Nagle, 101 United States, 793-4.
Railroad Company vs. Palmes, 109 United States, 256.

The argument of counsel for defendant in error in the third subdivision of his brief, touching this question of jurisdiction to construe the charter contract, is specious, but unconvincing. It is first argued that the finding of the
89 State court as to the effect of the consolidation under the amendment of March 2d, 1881, is a finding of *fact*, and therefore not reviewable here. The question is one of *law*, not of fact, and *Dover vs. Richards, 151 United States*, cited, is not applicable.

Counsel next cites *Lehigh Water Company vs. Easton, 121 United States, 388*, upon the proposition that the constitutional provision that "no State shall pass any law impairing the obligation of contracts," necessarily refers to the law made after the particular contract in suit. The rule asserted is conceded, but is not involved here. The contract which we assert was made in 1853, and is the original charter of
90 the Minneapolis & St. Louis Railway Company. This charter was amended in March, 1881. It is for this court to construe both the original act and the amendment. It may construe the original, because the direct question is whether the State constitution subsequently adopted impairs it. The amendment of 1881 is involved,—not because plaintiffs in error look to it as *granting* either corporate or individual franchises or immunities, but because it specifically *preserves* and continues those granted in 1853. Whether it has the effect claimed, depends upon its construction. This court should construe it independently, because the consoli-
91 dation agreement was entered into pursuant to its conditions and in reliance upon its clearly expressed terms, before it had been construed by the State court or any court.

Being an amendment to the original charter of 1853, it became, upon adoption, a part of such charter, and an additional guaranty of the franchises and immunities conferred by the Territorial act. The amendment assumes to make no change in the charter, but, on the contrary, assumes to guarantee a continuance of its immunities. *As construed by the State court, the Special Act of 1881 becomes a part of the procedure by which the State has violated the charter*

contract. It is one step in that direction taken by the
92 Legislature, the next and final step being taken by the court which construed the act and enforced it.

It is the *enforcement* of the constitutional liability against these plaintiffs in error which constitutes the grievance stated in the second and third assignments of error in this court. Whether enforced by the Legislature or the courts, or both, it is equally a violation of our contract right.

The construction placed upon the act of 1881 raises the question as to whether the Federal Constitution has been violated, for it is by such construction that we are deprived of the immunity guaranteed by the charter.
93 The right to amend the charter to take away its franchises did not exist when the act of 1881 was enacted; section Twenty-two of the act of 1853, which reserved the power of amendment being repealed by Section Six of Chapter 57, Special Laws of 1870.

At the time the several railroad companies entered into the consolidation agreement, they did so in good faith, and upon the assurance and condition embodied in both general and special acts, that all existing rights, privileges, franchises and immunities would be preserved. But for such conditions and assurance, the special act would not have been accepted. Each company was organized under a charter exempting stockholders from personal liability. The acts
94 of 1881 guaranteed the continuance of this immunity. It was a condition and an important consideration of the contract between the railroads and the State.

The defendant in error asserts the right of the State to violate its contract, and to act as the final judge as to its own right to do so. We deny both propositions. We assert the fundamental doctrine of Contract Law, that by accepting the act of 1881 and entering into the agreement of consolidation, the several companies did not accept disadvantages alone, but became entitled to the advantages. All of its provisions relating to consolidation must be taken together. If a new coporation was created, it was upon the terms and con-
95 ditions contained in the acts. It cannot be held that the companies, having accepted an act, can be deprived of its benefits.

In construing the special act it should be remembered that it neither creates nor confers new franchises. It continues old ones. It is only the franchises of the constituent companies which are conferred upon the consolidated company. This is the test. To hold that these several companies lost their respective franchises by consolidating them, in view of the care taken by the Legislature to preserve and continue them, is not consistent. Such is not the effect

96 of consolidation, even in the absence of saving legislation.

The law, as settled by this court, is that a State Legislature may continue and extend to a consolidated corporation all the rights, privileges and immunities of the constituent corporations, but that, unless it is clear that the Legislature intended to extend the exemption, privilege and immunities of each and every constituent company to the consolidated company, the exemption, privilege or immunity will be limited to the charter of the particular company to which the grant of such privilege, immunity or exemption was made, and that the property of each constituent company, and conse-
97 quently the stockholders in each constituent company, must be answerable according to the law under which each of the several corporations is created.

Central R. R. Co. vs. Georgia, 92 U. S., 665.

Tomlinson vs. Branch, 15 Wallace, 460, holds that where two railroad companies are consolidated, the presumption is that each of the two united lines of road will be respectively held with the privileges and burdens originally attaching thereto, unless the contrary is expressed. In the case at bar "the contrary" is not expressed; the existing immunities are carefully preserved, and the stockholders of each
98 constituent company were by law exempt from personal liability.

The question is thus reduced to one of legislative intent, which is clearly expressed in the statute under consideration in the case at bar.

It is held in *Chesapeake, etc., R. R. Co. vs. Virginia, 94 U. S., 726,* that, in case of consolidation, the consolidated company possesses the same immunities possessed by the constituent companies.

Green County vs. Conness, 109 U. S., 106, holds that "it is to be presumed that the franchises and privileges of each constituent road continue to exist in respect to the several roads as consolidated.

99 The question here presented is met by the opinion in the case of *County of Scotland vs. Thomas, 94 U. S., 682.*

In that case a railroad company was incorporated in 1857. At that time it was lawful for the county court of any county in which any part of the railroad was constructed, to subscribe to the stock of the company. By a provision of the State Constitution, adopted in 1865, the Legislature was forbidden to authorize such subscription, except upon certain conditions. Subsequent to the adoption of the constitution the Legislature authorized the consolidation of domestic

railroads with foreign railroads with whose lines the
100 railroad of the domestic corporation connected. Such
a consolidation was made. It was held that the corporation formed by the consolidation was not affected by the constitutional prohibition, and that the subscription authorized by the original Territorial charter might be made without regard to the constitution. This decision seems conclusive of the case at bar.

And see

County of Calloway vs. Foster, 93 U. S., 567.

It is held in *Tennessee vs. Whitworth, 117 U. S., 140-145-150,* that "when two corporations whose shares are by a State statute exempt from taxation within the State, and a third company created under the laws of another State,
101 consolidate *into a new company*, and issue shares in the new company in exchange for shares in the old companies, the right of exemption from taxation in the first State passes into the new shares and each of them, unless a law of the first State makes provision to the contrary.

The only case cited by counsel for defendant in error as authority to negative this proposition is *Shields vs. Ohio, 95 U. S., 319,* which is not authority, as the decision was controlled by a different statute, and the court. in its opinion, clearly distinguishes the case from the one at bar. The act under which the companies consolidated—which was general —provided in terms (see page 321) that such consolidated companies respectively "shall be deemed and taken to
102 be one corporation, possessing within the State all the rights, privileges and franchises, and subject to all the restrictions, liabilities and duties of such corporations of this State so consolidated."

As was said by MR. JUSTICE SWAYNE (see page 323), the new organization took the powers and faculties designated in advance in the acts authorizing the consolidation—no more and no less. *It did not acquire anything by mere transmission; it took everything by creation and grant.*"

In the case at bar the consolidated company took *nothing* by creation and grant, but everything by *transmission.* The distinction is too obvious to require argument.

103 The decision was by a divided court, MR. JUSTICE FIELD and MR. JUSTICE STRONG dissenting, and MR. CHIEF JUSTICE WAITE did not sit in the case nor take part in it. MR. JUSTICE STRONG was of the opinion that a new corporation was created, with the powers and restrictions of the constituent corporations; but held that, notwithstanding the Legislature had reserved the power to repeal, alter or amend the charter,

it was not competent for it to take away the rights conferred while subjecting it to all the duties imposed.

In the case at bar the right to amend or alter the charter was not reserved. The reservation was made by Section 22 of the original charter, but was repealed by Section 6,
104 Chapter 57, of the Special Laws of 1870; eleven years before the act of 1881 became a law.

I see no escape from the conclusion that the stockholders in the consolidated company are possessed of the rights, privileges, franchises, exemptions and immunities possessed by the stockholders of the constituent companies If it be true that the present consolidated corporation has legitimately succeeded to such rights and immunities, especially those guaranteed to the Minnesota Western Railroad Company by the Special Act of March 3d, 1853, the question as to whether such charter contract is impaired and vested rights infringed by the provision of the State Constitution, plainly pre-
105 sents a Federal question and assures the jurisdiction of this court.

VII.

The Constitutional provision impairs the obligation of the charter contract.

This court held, in the case of *Houston & Texas Railway Co., et al., vs. State of Texas, 170 U. S., 243, 261*, that the denial of a vested contract right impairs the obligation of a contract and is a deprivation of property without due process of law. Such, we claim, is the effect of the provision of the State Constitution, as applied to this case. The provision is
106 violative of Section 10, Article 1, and Section 1, Article 14, of the Federal Constitution.

In *Bank vs. Sharp, 6 Howard, 327*, this court said:

"One of the tests that a contract has been impaired is, that its value has by legislation been diminished. It is not, by the constitution, to be impaired at all. This is not a question of degree or manner or cause, but of encroaching in any respect on its obligation, dispensing with any part of its force."

In *Seibert vs. Lewis, 122 U. S., 294*, it is held to be the settled law of the nation that:

"The remedy subsisting in a State when and where a contract is
107 made and is to be performed is a part of the obligation of the contract, and a subsequent law of the State which substantially affects the remedy so as to lessen the value of the contract, impairs its obligation."

There can be no question that a law which imposes upon individual stockholders, personal liability for corporate debts

and grants to creditors of the corporation a remedy against such stockholders, diminishes the value of a charter which exempts the stockholders personally and withhold any remedy against them.

As MR. JUSTICE DAVIS said in *Ochiltree vs. Railroad Co., 21 Wallace, 252:*

108 "There are few persons who would consent to take stock in such enterprises, if subject to the double liability provision. Although willing to risk the loss of their stock, they would be unwilling to involve their estates beyond it."

While the decision of a State court may not be of great value here as authority, I will to call attention to the case of *Ireland vs. Turnpike Co., 19 Ohio State, 369, 371-2,* in which it is said:

"In our judgment, the act of May 3d, 1852, in so far as it authorizes assessments against stockholders who have paid the full amount of their subscriptions, and who by the charter of the company, or the laws under which it was organized, were not individually liable
109 for its debts, is unconstitutional. It impairs the validity of the contract between the company and the stockholder. In a contract between the company and a stockholder, or in an action for the former, or its creditors, against the latter, the stockholder is to be regarded as an individual person, separate and distinct from the corporation. He becomes a stockholder by virtue of a contract with the company, and he has a right to stand upon the terms of the contract, interpreted and limited by the laws under which it was made. By his contract with this company, Ireland agreed to pay a specified sum, and no more. This sum he has fully paid, and to require him to
110 contribute an additional amount would be to violate the contract between the parties. Let it be understood that the amount for which a stockholder becomes liable to the company by his subscription is not limited by his contract, but by the discretion of the directors, or the stockholders at large, and no prudent man will subscribe for stock in a corporation. If such be the law, it is of little importance to the subscriber whether the amount of stock taken be large or small, because it can be indefinitely increased at the pleasure of the company, whenever the Legislature sees proper to give the power to do so. If a subscriber contracts to pay a sum which he deems
111 within his means of payment, he may be called upon to contribute an amount utterly beyond those means, and which may render him bankrupt. No subscriber would be safe under such a law, or have any rule by which to determine the amount of stock he could afford to take. In vain would he look to the charter of the company, or to the provisions of the constitution and subsisting laws of the State, to learn the nature and extent of the liability he was about to incur, if that liability can, at the pleasure of the Legislature, be indefinitely increased or modified by retroactive laws."

It is not the desire of the plaintiffs in error to enter upon a discussion of the merits to any greater ex-
112 tent than is necessary to sustain the proposition that the case involves a Federal question; and further authority upon this branch of the case will not be cited at this time.

If a State be permitted to place a conclusive construction upon its contracts with individual citizens, the guaranteed protection of the Federal Constitution would be lost in all cases which such individuals or corporations were forced to litigate primarily in the State courts. Such courts might pronounce judgments in favor of the State in utter disregard of contract rights, and if the contract chanced to be in the form of a special act of the State Legislature, the wronged in-
113 dividual would be without remedy, but must, perforce, submit to the decision of the State, acting through its courts, construing the contract made by the State, acting through its Legislature.

VIII.

Counsel for defendant in error argues that the claim "that Section 3, Article 10, of the Constitution of Minnesota, as construed by the Supreme Court of Minnesota, and applied to the facts in this case, conflicts with the Federsl Constitution, in that it impairs the obligation of a contract contained in, and without due process of law deprives plaintiffs in error of property rights secured by the Minnesota Act of March
114 2d, 1881, was not raised upon the record prior to judgment in the Supreme Court of Minnesota.

This contention is without merit.

1. The defendant in error, in his amended complaint in the State court (Record, page 12, folios 23 and 24), affirmatively pleads the incorporation of the railway company in 1853, prior to the adoption of the State Coastitution; pleads the act of March, 1881, as an amendment to the original act—*by which it became a part of the act itself*—and pleads facts which bring the case at bar fully within the rule established by *Central R. R. Co. vs. Georgia, 92 U. S., 665*, and which distinguishes it from the exceptional cases wherein
115 it is held that anew corporation created by consolidation which did not succeed to the franchises of the constituent companies. The fact that the franchises, rights and property of the constituent companies were *merged* and *amalgamated*, as set forth in the amended complaint, insures the continuance of the immunity conferred by the original charter. They are two classes of cases, in one of which no new corporate franchises are granted to the consolidated company, but the existing franchises, immunities and rights of the constituent companies are amalgamated, merged, consolidated and continued. This is the class of cases covered by the decision in the case of *Central R. R. Co. vs.*
116 *Georgia, supra*, and numerous other cases hereinbefore cited, and such is the case at bar.

The other class of cases includes those wherein *new* corporate franchises and corporate rights are *created* by the law

under which the consolidation is had. An example of the latter class is found in the case of *Railroad vs. Georgia, 98 U. S., 359,* wherein the act providing for the consolidation specifically conferred upon the consolidated companies full corporate powers, including the right to acquire and hold property, to sue and be sued, to have a common seal, to make by-laws, and do everything of a corporate character. It was, for that reason alone, held that the corporate franchises of the constit-
117 uent companies were not continued to the new company. Such, also, is the case of *Shields vs. Ohio, supra.* The language of the complaint is conclusive against the contention of the defendant in error.

2. The act of March 2d, 1881, is but an amendment to the act of 1853. It is so entitled, and the plea in the answer of the plaintiffs in error, found on pages 43 and 44, folios 83 and 84 of the Record, that

"the said Minneapolis & St. Louis Railway Company was incorporated prior to the adoption or enactment of the constitutional provisions and statutes referred to That said Minneapolis & St. Louis
118 Railway Company was incorporated in the year 1853 under and pursuant to the provisions of Chapter 66 of the Special Laws enacted by the Legislature of the Territory of Minnesota, in the year 1853, under and by the name of the Minnesota Western Railroad Company, and which name was subsequently changed to the Minneapolis & St. Louis Railway Company, substantially as set forth in the first division of said complaint.

That the liability of the stockholders of said Minneapolis & St. Louis Railway Company was fixed by said act of incorporation, and not otherwise; and that the constitutional provision and laws
119 referred to in the complaint are not applicable to or binding upon these defendants in that behalf."

refers to the act of 1853 as amended, and as it existed at the time the answer was filed.

The amendment of March 2d, 1881, was a part of the act of which it was amendatory, and a rule of pleading requiring reference to every separate amendment to an act, is technical and wanting in merit. The amendment, when adopted, unquestionably became a part of the act itself.

3. The point was fairly presented in the assignments of error filed in the State Supreme Court. It was presented both generally and specifically.

120 Following are some of the assignments of error upon which the case was argued and submitted in the State Court (Record, pages 5, 6 and 7):

"III. The Court erred in holding that the Charter of the Minnesota Western Railroad Company, afterwards called the Minneapolis & St. Louis Railway Company, was ever amended so as to impose a double liability on the stockholders of said company, either by constitutional enactment or ancillary legislation, during the period throughout which said charter was subject to amendment.

"IV. The Court erred in holding that the double liability ever attached to the stock of any one of the four corporations which
121 entered into the consolidation agreement of 1881.

"V. The Court erred in holding that Section 3, Article 10, of the State Constitution, which imposes a double liability upon the stockholders of corporations (other than manufacturing or mechanical corporations), applies to corporations created before the adoption of said constitution.

"VI. The Court erred in holding that Section 3, Article 10, of the State Constitution, imposing a double liability on the stockholders of corporations (other than manufacturing or mechanical corporations), ever applied to the Minnesota Western Railroad Company, the
122 defendant railway company, or to the Minneapolis & Duluth Railroad Company.

"VII. The Court erred in holding that Section 3, Article 10, of the State Constitution, if applied to the defendant railway company, did not violate Section 10, Article 1, of the Constitution of the United States, in that the provisions of said Section 3, Article 10, impaired the obligation of the charter contract contained in said Chapter 66, Laws of 1853, Territory of Minnesota.

"VIII. The Court erred in holding that Section 3, Article 10, of the State Constitution, if applied to the defendant railway company,
123 is not in violation of the Fourteenth Amendment to the Constitution of the United States, in that the State of Minnesota, by and through the provisions of said Section 2, Article 10, assumed to impair and destroy rights theretofore vested in said defendant.

"IX. The Court erred in holding that Section 3, Article 10, of the State Constitution, if applied to the defendant railway company, is not in violation of the Fourteenth Amendment to the Constitution of the United States, in that the State of Minnesota, by and through the provisions of said Section 3, Article 10, assumes to abridge the privileges and immunities of the defendants as citizens, and to deny to
124 defendants the equal protection of the laws, and to deprive them of their property without due compensation or due process of law.

"XIII. The Court erred in holding that, by the passage of Chapter 113, Special Laws, 1881, the Legislature intended to abridge, or modify or repeal, and that said law did in fact abridge, modify or repeal any of the rights, privileges or immunities theretofore possessed by the corporation theretofore known as the Minneapolis & St. Louis Railway Compay.

"XIV The Court erred in holding that if, under Chapter 113, Special Laws 1881, there was in fact created a new corporate entity, such
125 new corporate entity did not possess all the rights, privileges and immunities, including exemption from double liability upon its stock, originally possessed by the corporation created under Chapter 66, Laws of 1853, Territory of Minnesota, and also possessed by the other corporations entering into said consolidation agreement."

If the adjudication of a Federal question is necessarily involved in the disposition of a case by a State court, it is not necessary that it should appear affirmatively in the record or in the opinion of the court that such a question was raised and decided.

Kaukana Water Power Co. vs. Green Bay & Miss.
126 *Canal Co., 142 U. S., 254.*
Roby vs. Colehour, 146 U. S., 153.

In order to preclude this court from taking jurisdiction, it must appear that the decision of the State court was made upon rules of general jurisprudence, or that the case was disposed of there upon other grounds, *broad enough in themselves to sustain the judgment without considering the Federal question*, and that such question was not necessarily involved.

New Orleans vs. New Orleans Water Works Co., 142 U. S., 79.

It is indeed difficult to find any rule of general jurisprudence to support the decision which we ask this court
127 to review. Upon its face it is an express violation of the contract embodied in Sections Twelve and Fourteen of the Special Act of 1881, under which the consolidation agreement was made, and the provisions of the general law of the State.

The State Legislature having continued and expressly preserved the original immunity, the decision stands squarely upon the proposition that the State Constitution was effective to take it away. We say, that by this decision our charter contract is impaired and our property taken
128 without due process of law. These are Federal questions.

The assumption upon the part of counsel for defendant in error that the Fourteenth Amendment is not applicable, because it was adopted subsequent to the adoption of the State Constitution, is not in accordance with the law.

Acts which are, by the Fourteennth Amendment, declared to be in violation of personal rights, are controlled by its provisions if committed subsequent to its adoption, although the law which assumed to authorize the act complained of is older than the amendment.

See

Kaukana Water Power vs. Green, 14 United States, 254, 269.

Neal vs. Delaware, 103 United States, 370, 389, 400.

IX.

Section 2 of Article 10 of the Constitution of Minnesota provides that no corporation shall be formed under special acts except for municipal purposes.
129 The construction placed upon the Special Act of March 2d, 1881, by the Supreme Court of the State, brings that act in conflict with the State Constitution. This construction is in violation of the rule laid down both by this court and the courts of Minnesota, that where a statute can

be so construed that it will be in accordance with, rather than in violation of a constitution, the former construction must be adopted.

The State court holds of its own motion, and in the utter absence of such an issue, that the acceptance of the act estops the constituent companies and their stockholders from questioning its constitutionality. The State itself asserts
130 the validity of the act as a basis for imposing the stockholders' liability. Unless the act be valid, there is no new corporation. If the State asserts its validity and the plaintiffs in error are estopped to deny its invalidity, the act is, as to this case, wholly valid. If valid, both parties are bound by its provisions and conditions. The State cannot deny the validity of that which it has expressly validated.

Houston & Texas R. R. Co. vs. Texas, 170 U. S., 259.

The constituent companies accepted the act as a whole, and entered into the consolidation agreement upon the condition that all their franchises, exemptions and immunities are to remain intact and inviolate. The State is estopped
131 to assert that the act is valid to create a new corporation, and invalid to protect the franchises conferred upon that corporation by the act itself. It is valid or it is not. If valid, the stockholders are exempt from personal liability by virtue of the act. If invalid, they are exempt by virtue of the original charters.

The Supreme Court of Minnesota said, in respect to this same case, *in re Minneapolis & St. Louis Railway Company, 36 Minn., 486:*

"If the consolidation agreement is void because the special act in question is unconstitutional, then the St. Louis Company, whose existence and organization under its original charter, and the acts
132 amendatory thereof, cannot be questioned here, has never been merged or ceased to exist, and may be deemed to be the corporation represented in these proceedings. Its franchises continue to be exercised, and this court cannot institute a collateral inquiry as to the rights of stockholders, or whether the present officer and manager has been regularly and legally elected and placed in control of its affairs or not."

X.

It is conceded by the State court that its construction of the Special Act of March 2, 1881, brings the act itself in conflict with Section 2, Article 10, of the State Constitution, which forbids the formation of corporations by special act.
133 The decision of the State court is a concession that the stockholders of each constituent company were exempt from personal liability; that the special act is violative of the State Constitution; that the construction claimed by plaintiffs in error will bring it in accord with the constitution; yet

the stockholders are held to be liable. The logical conclusion from a holding that perforce makes the special act unconstitutional, would be that the consolidation, being unauthorized, is void, and the constituent corporations still exist; as was held *in re Minneapolis & St. Louis Railway Co., 36 Minnesota, 486.*

Plaintiffs in Error are not estopped to deny the
134 *constitutionality of the act.*

The State court holds that, although the act is unconstitutional, the plaintiffs in error are bound thereby, having accepted its provisions and entered into the consolidation agreement pursuant thereto.

The act was accepted in the belief that it would be construed as it was construed by the parties accepting it—in accordance with the constitution. We cannot acquiesce in the justice of a ruling by which a statute capable of a construction in accordance with the settled principles of law and the constitution of the State is accepted by the interested parties, presuming that it will receive such construction, is so
135 construed as to violate the constitution, and thus deprive these plaintiffs in error of the benefit of the conditions which led to its acceptance.

This statute is a contract which was not construed by any court until after it was accepted and acted upon; and we appeal to this court to now construe it in accord with what we believe to be substantial justice.

If the act is unconstitutional it is void. An unconstitutional law is no law. It confers no right, it imposes no duties, it affords no protection, it creates no office,—it is as inoperative as if it had never been passed.

136 *Norton vs. Shelby County, 118 U. S., 425, 442.*

"The powers of the Legislature are derived from the constitution, and are subordinate to it. They are but one branch of the sovereignty, their acts depend upon are limited by, and must be conformable to the constitution. Every act of the Legislature repugnant to this written fundamental law is void."

Dwarris on Statutes, 45, 46.

The ruling of the State Supreme Court that plaintiffs are estopped to assert the invalidity of this statute which, as construed by that court is wholly void, is entirely without support. The question was not suggested by the pleadings nor argued by counsel.

137 It is only when parties have procured the passage of an act under which they have acted and obtained benefits that they are estopped to assert its unconstitutionality. Such is not the case here. The plaintiffs in error derive no advantage from a holding that the act is unconstitutional. It is their contention that the act was what its title states it to

be—an amendment to the Territorial act of March 2, 1853—not intended or designed to create a new corporation, nor to grant new franchises—but to authorize a consolidation agreement which should merge the constituent companies in the Minneapolis & St. Louis (Minnesota Western) Railway
138 Company, and amalgamate, merge and continue all the franchises of each constituent company under the rule laid down in the cases herein cited. Such construction brings the act in accord with both Federal and State Constitutions, with the former decisions of the State Supreme Court, makes the act itself effective in accordance with its expressed terms, and preserves the immunity of the stockholders.

The construction of the State court violates both Federal and State Constitutions, defeats the plainly expressed purpose of the State Legislature, and asserts an estoppel against the plaintiffs in error, notwithstanding they have at all times predicated their rights upon a construction of the law
139 which is in accord with the constitution.

In *Town of South Ottawa vs. Perkins*, *94 U. S., 267*. MR. JUSTICE BRADLEY says:

"There can be no estoppel in the way of ascertaining the existence of a law. That which purports to be a law of a State is a law, or it is not a law, *according as the truth of the fact may be*, and not according to the shifting circumstances of the parties. It would be an intolerable state of things if a document purporting to be an act of the Legislature could thus be a law in one case and for one party, and not a law in another case and for another party: a law to-day, and not a law to-morrow; a law in one place and not a law in another in the
140 same State. And whether it be a law, or not a law, is a judicial question to be settled and determined by the courts and judges. The doctrine of estoppel is totally inadmissable in the case."

The case lacks every element of estoppel. There has been no act by the plaintiffs in error inconsistent with the construction for which they contend. This claim is a judgment in a personal injury case—a tort. No credit was extended by the defendant in error in reliance upon the liability of stockholders. Every act of the plaintiffs in error has been consistent with the validity of the act of 1881, con-
141 strued in accordance with the State and Federal Constitutions. Correctly construed, the statute is valid.

The case of *Eustis vs. Bowles*, *150 U. S., 361*, cited by counsel for defendant in error, is no authority upon this question. In that case the plaintiff, Eustis, knowing the facts and the law, which were plain and unambiguous, elected to accept the composition and the dividend, and was held estopped by his own action, which was taken knowingly and understandingly In the case at bar the stockholders accepted the act of 1881 because they believed that all existing franchises and immunities were preserved; the assurance being in the language of the act itself. *Instead of misleading the*

142 *State, they were misled by the State*, which now denies the validity of its own agreement, by which the acceptance of the act was brought about.

XI.

Plaintiffs in error in accepting the Special Act of March 2d, 1881, relied upon the decisions of the highest court of Minnesota, which held:—

In *Robertson vs. Sibley, 10 Minn., 323 (Gil. 253-256)*, that stockholders in corporations created prior to the State Constitution are not liable for corporate debts.

In *State vs. Town of Clark, 23 Minn., 422-428-429*, and *St. Paul vs. Railway Co., 23 Minn., 474-475*, that the contracts embodied in Territorial charters are not affected
143 by constitutional provisions subsequently adopted.

In *Hillebert vs. Porter, 28 Minn., 497*, and *State vs. Foley, 30 Minn., 353*, that the existing law of the Territory entered into the charter contract.

In *Huff vs. Winona & St. Peter R. R. Co., 11 Minn., 180 (Gil. 114)*, (see particularly page 124, Gilfillan Edition), and *R. R. Co. vs. Parcher, 14 Minn., 297, (Gil. 224)*, (see particularly page 235, Gil. Ed.), that existing franchises may be transferred or continued to a new corporation.

The last proposition is also affirmed by Chapter 94, General Laws, 1881.

144 All these decisions were made prior to the enactment of the Special Act of 1881, under which the consolidation agreement was made. It is well settled that where the courts of a State have declared the law upon a given subject, and parties have acted in accordance with such decisions, the law must be taken to be as so declared, whether such decision be in fact right or wrong.

In the case of *City vs. Lamson, 9 Wallace, 478*, the Supreme Court of Wisconsin had at one time held that a certain act which authorized the City of Kenosha to issue bonds was valid, and that the bonds were issued in reliance upon
145 such decision. The same court afterwards held the act unconstitutional. This court held that, although the law was in fact unconstitutional and had been so declared, the fact that the Supreme Court of Wisconsin had, at the time the bonds were issued, declared it valid, made it so as to that transaction.

In the case at bar the Supreme Court of Minnesota as-

sumes and attempts to unmake the law which it has heretofore made, and in reliance on which the consolidation contract was entered into.

146 XII.

Counsel's argument upon the motion to affirm, is limited to the assertion that the question involved is frivolous. The argument is easy, but not convincing. It may be the best one available.

The question which absolutely controls this case upon the merits, is this:—

Are the franchises, rights, privileges and immunities possessed by the consolidated company the same
147 *franchises, rights and immunities originally granted to the several constituent companies, or are they new rights, franchises and immunities created and first brought into existence by the act of 1881?*

If they are the ones first created, the fact that they have been united does not lessen, impair or affect them. If they are *the same*, they are necessarily unchanged and unimpaired.

If they are *new* franchises granted in 1881, the case was rightly decided.

In the determination of this pivotal question, the fol-
148 lowing conceded facts are controlling:

1. Until June, 1881, when the consolidation agreement became effective, the rights and franchises of the several companies remained as when granted.

2. Prior to the approval of the Special Act of 1881, authorizing the consolidation, no attempt was made to alter, amend, repeal, or in any way impair the charter rights or privileges of the constituent companies.

3. At that date (March 2d, 1881) the Legislature was without power or authority to amend, alter or in any respect impair such rights, privileges and franchises, because Section 22 of the Charter Act of 1853, reserving such power to
149 the Legislature, had been repealed by Section 6 of Chapter 57 of the Special Laws of 1870.

4. The Special Act of 1881, authorizing the consolidation, does not assume to create or grant any new rights, privileges or franchises; but specifically and in terms (see Sec. 12) continues to the new corporation, *first*, all the rights and franchises of the constituent companies, and *second* (see Sec. 14), all the rights and franchises of the Minnesota Western Railroad Company under the charter of 1853.

5. Section 2 of Chapter 94, of the General Laws of 1881, provides that when railroad corporations, whether organized under the general law or by virtue of a special charter
150 of the State or Territory of Minnesota, or under the laws of any other State or States, or Territory, consolidate, "the said corporations shall become merged in the new corporation provided for in said articles, to be known thereafter by the corporate name therein adopted, and shall, within this State, succeed to all the rights, powers, franchises, contracts, privileges, immunities, liabilities, obligations and duties, liabilities to or exemption from taxation, commutations, property, real, personal and mixed, and things in action, *as fully in all respects as the same were possessed by said old corporation or corporations at such time under the laws*
151 *of this State; and such new corporation shall hold and enjoy the same, and each and every part thereof, without change, and as fully as if said consolidation had not taken place.*" This determines the power of the State to transfer franchises.

Upon these propositions, each of which is incontrovertible and must be conceded, there can be but one answer to the question upon which this case depends.

Respectfully submitted,

ALBERT E. CLARKE,

Attorney for Plaintiffs in Error.

CHAPTER 66, SPECIAL LAWS, 1853.

An Act to Incorporate the Minnesota Western Railroad Company.

Be it enacted by the Legislative Assembly of the Territory of Minnesota:

Robert J. Walker, A. Hyatt Smith, Joseph B. Doe, Otis Hoyt, Benjamin Allen, H. M. Rice, Franklin Steele, Socrates Nelson, H. Z. Hayner, Martin McLeod, Alexander Wilkin, M. S. Wilkinson and N. Greene Wilcox, together with such other persons as may hereafter become associated with them in the manner hereinafter prescribed, their successors and assigns, are hereby created a body corporate, by the name of the Minnesota Western Railroad Company, and by that name shall be and are hereby made capable in law, to purchase, hold and enjoy, and retain to them and their successors, lands,
152 tenements and hereditaments, so far as may be necessary for the purpose of said railroad, and the same to sell, grant, rent, or in any manner dispose of, to contract and be contracted with, to sue and be sued, implead and be impleaded, answer and be answered, defend and be defended, and also to make, have and use a common seal, the same to alter, break or renew at their pleasure; and if either of the persons named in this section shall die, refuse or neglect to execute the powers and discharge the duties hereby created, it shall be the duty of the remaining persons hereinbefore named, or a majority of them, to appoint a suitable per-
153 son or persons to fill such vacancy or vacancies, so often as the same shall occur.

SEC. 2. The said corporation are empowered to cause such examination or surveys to be made as shall be necessary to ascertain the most advantageous route whereon to construct a railroad, and shall cause an estimate to be made of the probable cost thereof. And the said corporation shall be, and they are hereby invested with the right to construct a railroad, with one or more railways or tracks, from some convenient point to be selected on Lake St. Croix, or St. Croix River, thence running to the town of St. Paul and the Falls of St. Anthony, on the Mississippi River; thence across
154 said river, by the most feasible route, to the western boundary of said Territory, at such point as shall be deemed most expedient by said company, with a branch to the Red River, to a point to be selected on said river, and also

a branch running to a point to be selected on the St. Louis River, if deemed advisable by said company.

SEC. 3. The capital stock of said corporation shall be Two Million of Dollars, and shall be divided into shares of one hundred dollars each, and five dollars on each share shall be paid at the time of subscribing.

SEC. 4. The above named persons, or a majority of
155 them, are authorized to open books for receiving subscriptions to the capital stock of said company, and shall prescribe the form of such subscription, which books shall be opened at such place or places as they may deem expedient, by giving thirty days notice in some newspaper printed in the Territory of Minnesota, and in such other place or places as may be thought advisable, of the time and place, or time and places of opening; said books to be kept open thirty days.

SEC. 5. So soon as said stock, or one hundred thousand dollars thereof, shall have been subscribed, the above named persons, or the same number thereof as shall have giv-
156 en the notice above required, shall give like notice for the meeting of the stockholders to choose directors, at some time at least thirty days thereafter, and at some place within said Territory of Minnesota. And if at such time and place the holders of one-half or more of said stock subscribed, shall attend either in person or by lawful proxy, they shall proceed to choose from the stockholders, by ballot, nine directors, each share of capital stock entitling the owner to one vote, and at such election the persons named in the first section of this act, or those appointed by its provisions to fill vacancies which may have occurred, or any three of them,
157 if no more be present, shall be inspectors of such election, and shall certify in writing, signed by them, or a majority of them, what persons are elected directors, and if two or more have an equal number of votes such inspectors shall determine by lot which of them shall be directors, to complete the number required, and shall certify the same in like manner; and such inspectors shall appoint the time and place of holding the first meeting of directors, at which meeting five shall form a board competent to transact all business of the company, and thereafter a new election of directors shall be made annually, at such time and places as the stock-
158 holders at their first meeting shall appoint, and if the stockholders at their first meeting shall fail to appoint the day of such election, then it shall be holden in the succeeding year, on the same day of the same month on which said first election was holden, unless the same shall be on the first day of the week, in which case it shall be holden on the day next succeeding; and if no election be made on the day appointed, said company shall not be dissolved; but said election may be made at any time appointed by the by-laws of said company; the said directors shall elect one of their number president, and shall appoint a secretary, treasurer,

such engineers and other officers as they may find necessary, shall fix their compensation, and may require adequate security for the performance of their respective trusts.

SEC. 6. The directors may receive payment to the subscriptions to the capital stock at such time, in such proportion, not exceeding twenty-five per cent. at any one installment, under such conditions as they shall deem fit, under the penalty of forfeiture of all previous payments thereon, or otherwise; *provided*, they shall never require the payment to be made at any place out of the counties through which said road shall pass. And such directors shall, at least thirty days previous to the appointed time of such required payment, give notice thereof in the manner required in the fourth section of this act for giving notice of the opening of the books of subscription for the stock of said company.

SEC. 7. The directors of said company shall have power to make, from time to time, all needful rules, regulations and by-laws touching the business of said company, and to determine the number of tracks and railways upon such road, and the width thereof, and the description of carriages which may be used thereon, to regulate the amount of tolls and the manner of collecting the same, for such transportation, and to fix penalties for the breach of any such rules, regulations or by-laws, and to direct the mode and condition of transferring the stock of said company; and penalties provided for by the said by-laws may be sued for by any person authorized thereby, in the name of said company, and recover in a civil action before any court having jurisdiction of the amount, and the said company may erect and maintain toll houses and such other buildings and fixtures as the accommodation of those using said road may require.

SEC. 8. The said company may construct the said railroad across any public or private road, highway, stream of water, or water course, if the same shall be necessary; but the said company shall restore such road, highway, stream of water or water course, to its former state, or in a sufficient manner not to impair its usefulness to the owner or to the public.

SEC. 9. So soon as the amount of tolls accruing and received from the use of said road, or part thereof, according to the provisions of this act, shall exceed six per cent. on the amount of said capital stock paid in, after deducting therefrom the expenses and liabilities of said company, the directors of said company shall make a dividend of such net profits among the stockholders, in proportion to their respective shares, and no accumulative fund exceeding one per cent. of the profits of said company shall remain undivided for more than six months.

SEC. 10. If any person or persons shall wilfully obstruct or in any way spoil, injure or destroy said road or any of its depots, cars, store houses, buildings, machine shops or other

fixtures, or anything belonging or incidental thereto, or any materials to be used in the construction thereof, or any
164 building, fixture, or carriage erected or constructed for the use and convenience thereof, such person or persons shall each be liable for every such offense to treble the damages sustained thereby, to be recovered in a civil action in any court having jurisdiction of the amount.

SEC. 11. Whenever it shall become necessary, in the location or construction of said road, to pass through the land of any individual, it shall be the duty of said company to provide for said individual proper wagon ways, and all necessary roads and passages across the track of said railroad, or otherwise the company shall be liable to such individual in
165 treble the amount of damages occasioned by such neglect.

SEC. 12. Said company shall have power to increase its capital stock six millions of dollars.

SEC. 13. Said company shall have power to increase its number of directors to any number not exceeding fifteen.

SEC. 14. The said company shall have the right to enter upon any lands, to survey and lay down said road, not exceeding one hundred and thirty feet in width, except where it is necessary to leave room for turn outs, sites for water, buildings, conduits and tank sites, for depots and store hous-
166 es, machine and other shops, and the extra tracks therefor, and whenever it is necessary to have such lands, they shall have the right to enter upon, take, hold and occupy such lands, and also to enter upon any lands adjoining said road, and obtain therefrom sand, gravel, stone and other materials as may be necessary for the construction of said road, and whenever any lands or materials shall be required for the construction of said road, and the same shall not be given or granted to said company, the compensation to be paid therefor by said company shall be ascertained in the manner following, to-wit: Said company shall apply to the Judge
167 of the District Court of the Territory of Minnesota for the appointment of three commissioners, whose duty it shall be, at the earliest practicable time after their appointment, to proceed to examine and assess the damages which may be sustained by the several owners or claimants of the lands through which the road of said company is located, and the said commissioners, in assessing said damages, shall deduct therefrom the benefit which said lands receive by the construction of said road. It shall be the duty of said company to give thirty days' notice of their application for the appointment of said commissioners, in one or more
168 newspapers published in each of the counties through which said road is laid out, and in case no newspaper is published in any one of said counties, then by posting up such notice on the door of the court house in said county, thirty days before the time of making such application, and it shall be the duty of said commissioners to cause ten days'

notice of their meeting to appraise the damages of any lands through which said road may run, to be given to the owner or claimant thereof, and, in case said owner or claimant shall be a minor, insane person or unmarried woman, then such notice shall be given to the guardian, committee
169 or husband of such minor, insane person or unmarried woman. Either party feeling himself aggrieved by the decision of said commissioners may appeal to the District Court of the county in which said lands may be situated, and said appeal shall be tried in the same manner as any suit commenced therein. *Provided*, That said company shall not in any manner be delayed in the construction of their road by any such appeal, but may proceed immediately with such construction on paying into the office of the clerk of said court the amount of moneys awarded to the owner or owners of such lands, and filing a bond with said clerk, to said owner or owners,
170 binding such company to pay such further sum as may finally be awarded against said company. The notice to be given by the commissioners to the owners of lands required for the railroad shall be in writing, and delivered to said owner or owners, or left at their usual place of residence, if residents of this Territory, or, if non-residents, then said notice to be given in a newspaper published in the county in which such land is situated, at least four weeks before making said appraisement.

SEC. 15. Said company is hereby authorized to borrow money to be expended in the construction and equip-
171 ment of their said road and its appendages, and to issue bonds for the payment thereof, in the usual form; such bonds not to exceed in the aggregate, at the period of the completion of said road, three-fourths of the whole amount actually expended on said road and its appendages aforesaid; and may make and execute, in the corporate name of said company, all necessary mortgages, writings, notes, bonds or other papers, for any liability that it may incur in the construction or equipment of said road.

SEC. 16. The said company is hereby authorized and empowered to construct their said railroad and its branch-
172 es in sections as fast as they may obtain the means for so doing; and the franchise of the portions so completed and put in operation shall vest in said company, the same as though the whole was completed.

SEC. 17. Said company is authorized and empowered to connect its road with the road of any railroad company or companies in the Territory of Minnesota; or to become part owner or lessee of any railroad in said Territory, and any railroad company in said Territory of Minnesota, duly organized under the laws of said Territory, may connect its road with the road of said company, and may in like manner, with the
173 consent of said company, become part owner or lessee of the road of said company, or any of its branches, or any portion thereof, situated in this Territory.

SEC. 18. The fee simple of all lands granted, along the line of said road or otherwise, by the Congress of the United States, for the purpose of aiding in the construction of said road, may be directly granted to said company, and shall be vested in or transferred to said company, and said company is hereby authorized to receive the title thereto, and is hereby empowered to transfer just and proportionate parts of said lands from time to time, and to convey in fee simple
174 or otherwise, as soon and as often as five miles of said road shall be constructed and completed, and the track thereof shall be put in running order, and this grant shall not become void, nor this company be dissolved, by the non-completion of the entire extent of said road, but shall be good and valid, to all intents and purposes, for the parts or portions of said road completed, and said company shall continue and survive to that extent.

SEC. 19. This company shall have power to enter upon and pass over the railroad of any other company whose railroad connects with that of this company, with their cars
175 and engines, and any other company shall have like power to enter upon this railroad, whose railroad connects with this railroad, and pass over the same with their cars and engines; and such reciprocal use of said respective railroads shall be upon terms to be agreed upon by the officers of the respective companies, and in case such terms cannot be agreed upon by said officers, then an application may be made by either party to the Supreme Court of this Territory, whose duty it shall be to fix such terms for the respective parties as the equity of the case may demand.

176 SEC. 20. The said Minnesota Western Railroad Company shall commence and complete their said road from the St. Croix Lake or St. Croix River to St. Paul within six years from the passage of this act.

SEC. 21. This act shall be favorably construed in all legal and equitable proceedings for the accomplishment of the objects intended by this act.

SEC. 22. The Legislature may at any time amend or alter this act. *(Repealed Feb., 1870.)*

Approved March 3, 1853.

SECTION 5, CHAPTER 57, SPECIAL LAWS OF 1870.

177 SEC. 5. Section twenty-one of said act, approved March third, one thousand eight hundred and fifty-three, is hereby amended by adding to the end thereof the following words: And said company may, by a resolution of its board of directors, change the name of said company and adopt any suitable name, by which said company shall in future be known, and may designate the name by which any branch line shall be known, to take effect after public notice of such change shall be given for one month in any daily paper published at the City of Minneapolis, but such change of name shall not affect any rights or liabilities of said
178 company under any former name. And said company shall have power to create and issue, in such manner and on such terms as it may deem expedient, one or more classes of preferred stock and special stock, and to make such agreements as it may deem proper with the respective holders thereof, as to the dividends thereon, and the securities for such dividends; and to make such agreements as it may deem proper with the holders of any such special stock for the appropriation of the net earnings of any portion of the railroad which it may construct or otherwise acquire to the payment of dividends on such special stock as may be
179 issued in respect thereto, which appropriation, as made by such agreement, shall be effectual to secure to the said and future holders of such stock, the application of such net earnings as in the said agreement provided, against any future act of the company or any of its general liabilities. And the said company may make such agreements as it may deem proper with the holders of any such special stock as to the construction and administration of the portion of said railroad to which said stock may pertain; and for the separate organization of the holders of such special stock for the purpose of that construction and administration, and en-
180 abling them, or directors chosen by them, separately or in conjunction with the other directors, to exercise, in respect to the portion of the road to which such special stock may pertain, all the powers of the company, subject to the provisions of such agreement, when made and entered into. * * * * *

CHAPTER 113, SPECIAL LAWS 1881.

An Act to amend an Act entitled An Act to Amend an Act entitled An Act to Incorporate the Minnesota Western Railroad Company, approved March third (3d), one thousand eight hundred and fifty-three (1853), and the acts amendatory thereof, approved February
181 *fourth, one thousand eight hundred and seventy (1870).*

Be it enacted by the Legislature of the State of Minnesota:

SECTION 1. That the act entitled an act to amend an act entitled an act to incorporate the Minnesota Western Railroad Company, approved March third (3d), one thousand eight hundred and fifty-three (1853), and the acts amendatory thereof, approved February fourth (4th), one thousand eight hundred and seventy (1870), be amended by adding thereto the following sections, to-wit:

182 SECTION EIGHT (8). The Minneapolis & St. Louis Railway Company, formerly known as the Minnesota Western Railroad Company, in addition to the powers already conferred upon it by the laws of the Territory of Minnesota and of the State of Minnesota, is hereby authorized to make or acquire, from time to time, any extension of the lines of railway now owned or operated by it, or of those hereafter constructed and operated by it according to law, into the State of Iowa, Missouri, Kansas, Nebraska and Wisconsin, and into the Territory of Dakota, or into one or more of the same. *Provided*,
183 That authority shall exist or be given in or by the States or Territory into which its lines are so extended to make or acquire and maintain such extensions.

SECTION NINE (9). The said Minneapolis & St. Louis Railway Company shall have power to acquire, from time to time, by lease or purchase, or exchange of stock or otherwise, any other railroad or railroads, whether within or without this State, whose lines connect with its own lines as they now exist or as they shall be extended, either directly or by means of intervening lines. Such acquisition shall be made upon
184 such terms as shall be agreed upon by a contract in writing between the respective corporations. But the same shall not be consummated until first approved by

two-thirds in amount of the stockholders of each such corporation, either given at a regular or called meeting of such stockholders, or by a consent expressed in writing. In either case a copy of such contract, together with the evidence of such consent of the stockholders, shall be filed in the office of the Secretary of State.

SECTION TEN (10). It shall and may be lawful for the said Minneapolis & St. Louis Railway Company to merge and consolidate its capital, franchises and property with the
185 capital stock, franchises and property of any other railroad company or companies organized under the laws of this State or under the laws of any other State or Territory of the United States, in the construction of whose lines the said Minneapolis & St. Louis Railway Company shall have aided, or whose lines of railroad are or shall, at the time of such consolidation, be held under lease by the said Minneaplis & St. Louis Railway Company. *Provided*, That the lines of railway of the companies or corporations so consolidating shall form a continuous line of railway with each other, or by means of any intervening railway, bridge or ferry. But
186 no such consolidation shall be made by the said company with any other railroad corporation, or the lesses, purchaser or manager of any railroad corporation owning or controlling a parallel or competing line.

Such consolidation shall be made under the conditions, provisions and restrictions, and with the powers hereinafter mentioned and contained, that is to say:

First (1st). The dirccctors of the company proposing to consolidate may enter into a joint agreement, under the corporate seal of each company, for the consolidation of said companies and railroads, which agreement shall prescribe the terms
187 and conditions thereof, and the mode of carrying the same into effect, the name of the new corporation, which may be the name of either corporation party thereto, or any other name, the number, names and places of residence of the directors and other officers thereof, who shall be the directors and officers thereof for the first (1st) year. The amount of the capital stock of the new company, which shall not exceed the amount of twenty million (20,000,000) dollars, the number of shares into which such capital stock is to be divided (which stock may be divided into classes, with such preferences in respect to any of the classes as may be agreed upon),
188 the amount or par value of each share, the manner of converting or exchanging the capital stock of each of the said companies so consolidating into or for that of the new corporation and the terms of such conversion, the manner of compensating stockholders in each of the old corporations who decline to convert their stock into the stock of the new corporation, and how and when directors and officers shall be chosen, with such other details as they shall deem necessary

to perfect such new organization and the consolidation of such companies or railroads.

Second (2d). Such agreement of the directors shall
189 not be deemed to be the agreement of the said old corporations until after it has been submitted to the stockholders of each of the said corporations, separately, at a meeting thereof, to be called upon a notice of at least thirty (30) days, specifying the time and place of such meeting and the object thereof, to be addressed to each of such stockholders when their place of residence is known, and deposited in the postoffice, and published at least three (3) successive weeks in one newspaper in each of the cities, counties or towns in which the said corporations have their principal office or business, and is sanctioned by such stockholders by a
190 vote of at least two-thirds in amount of the stockholders present at such meeting, either in person or by proxy, each share of the capital stock being entitled to one vote; and when such agreement of the directors is so sanctioned by each of the meetings of the stockholders separately, it shall be deemed the agreement of the said old corporations.

Third (3d). If the holder of any stock in either of the corporations existing under the laws of this State and so consolidated at the time of making such consolidation, shall be dissatisfied with the same, the consolidated company shall pay to such dissatisfied stockholder or stockholders the full
191 actual value of his or their stock immediately prior to such consolidation, which value shall be assessed and fixed by three disinterested commissioners, appointed for that purpose by the Supreme Court of this State, upon the application of either party, made upon twenty (20) days' notice, but the said company shall not be compelled to pay for the stocks of such dissatisfied stockholder or stockholders unless he or they shall give written notice of such dissatisfaction to the president, secretary or treasurer of the company whose stock shall be held by him or them, within three (3) months after such consolidation shall have been consented to by
192 the requisite number of stockholders.

SECTION ELEVEN (11). Upon the approval of such agreement and act of consolidation as hereinbefore provided, and upon the filing of the same or a copy thereof, in the office of the Secretary of State, the said corporations, parties thereto, shall be deemed and taken to be one corporation, by the name provided in the said agreement and act, and the stock of the new corporation issued under the terms of such agreement and act of consolidation in exchange for the stock of the former companies, shall be deemed and taken as lawful stock, and subject only to such further payments, calls or assess-
193 ments, if any, as may be mentioned in the said consolidation agreement, and such new corporation shall pos-

sess all the powers, rights and franchises conferred upon each of its constituent corporations, and shall be subject to all the restrictions and duties imposed by the laws of the State.

SECTION TWELVE (12). *Upon the consummation of said act of consolidation as aforesaid, all and singular the rights, privileges, exemptions and franchises of each of said corporations parties to the same, and all the*
194 *property, real, personal and mixed, and all the debts due on whatever account to either of said corporations, as well as all stock, subscriptions and other things in action belonging to either of said corporations, shall be taken and deemed to be transferred to, and vested in such new corporation without further act or deed,* and all claims, demands, property, rights of way, and every other interest shall be as effectually the property of the new corporation as they were of the former corporations parties to the said agreement and act, and the title to all real estate, taken by deed or otherwise under the laws of this State, vested in either of said corporations, parties to said agreement and act,
195 shall not be deemed to revert or be in any way impaired by reason of this act, or anything done by virture thereof, but shall be vested in the new corporation by virtue of such act of consolidation.

SECTION THIRTEEN (13). The rights of all creditors of and all the holders of liens upon the property of either of said corporations parties to said agreement and act, shall remain and be preserved unimpaired, and shall be assumed and borne by the new corporation, and the respective cor-
196 porations shall be deemed to continue in existence so far as necessary to preserve the same, and all debts and liabilities incurred by either of said corporations shall thenceforth attach to such new corporation and be enforced against it and its property to the same extent as if said debts or liabilities had been originally incurred or constructed by it. No suit or action or other proceeding now pending before any court or tribunal in which either of said railroad companies is a party, shall be deemed to have abated or been discontinued by the agreement and act of consolidation as aforesaid, but the same may be conducted in the name of the ex-
197 isting corporation to final judgment, or such new corporation may be, by order of the court, on motion, substituted as a party; suits may be brought and maintained against such new corporation for all causes of action in the same manner as against other railroad corporations in this State.

SECTION FOURTEEN (14). All the provisions of the general laws of this State, in regard to railroad corporations, shall be applicable to any new corporations formed by consolidation under the provisions of this act, except so far as the same shall not be applicable thereto by reason of the situation
198 of portions of its line without this State. *Provided, that, nevertheless, the privileges, franchises, exemp-*

tions, immunities, hitherto granted to the Minneapolis & St. Louis Railway Company shall continue to and be vested in such new corporation with the same effect as if originally granted thereto, and that such new corporation may at any time hereafter be consolidated with any other railroad company or companies in the same manner and with the same effect as is by this act provided.

SECTION TWO. This act shall take effect and be in
199 force from and after its passage.

Approved this second day of March, A. D. 1881.

No. 160.

Reply Br. of Clarke for P. E.

FEB 26 1900
JAMES H. McKENNEY,
Clerk

SUPREME COURT OF THE UNITED STATES

Filed Feb. 26, 1900.

October Term, 1898.

Term No. 160.

THE MINNEAPOLIS & ST. LOUIS RAILWAY COMPANY, *et al.*,

Plaintiffs in Error,

vs.

HENRY A. GARDNER,

Defendant in Error.

IN ERROR TO THE SUPREME COURT OF THE STATE OF MINNESOTA.

ADDITIONAL BRIEF OF PLAINTIFFS IN ERROR.

ALBERT E. CLARKE,
Attorney for Plaintiffs in Error.

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L. T. MICHENER,
WILLIAM STRAUSS,
of Counsel.

SUPREME COURT OF THE UNITED STATES.

October Term, 1898.

Term No. 607.

THE MINNEAPOLIS & ST. LOUIS RAILWAY COMPANY, *et al.*,

Plaintiffs in Error,

vs.

HENRY A. GARDNER,

Defendant in Error.

IN ERROR TO THE SUPREME COURT OF THE STATE OF MINNESOTA.

ADDITIONAL BRIEF FOR PLAINTIFFS IN ERROR.

Not being able to attend personally at the submission of this case, I respectfully submit this additional brief by way of reply to some suggestions made by counsel for defendant in error, in his brief filed January 1st, 1900.

2 I.

Counsel for defendant in error says, at page 12 of his brief:

"In their second assignment, plaintiffs in error assert that the State of Minnesota, by means of the provisions of Section 3, Article 10, of its constitution, has attempted, in violation of the Fourteenth Amendment of the Federal Constitution, to deprive plaintiffs in error of rights vested in them by the Act of 1881. I cannot discover that counsel for plaintiffs in error, in his brief filed on the motion to dismiss or affirm, has anywhere attempted an explanation of the claim con-
3 tained in this assignment. It cannot be, however, that the assignment is intended to set forth a claim that the provision of the Minnesota Constitution, which became operative in 1858, of itself destroys rights vested in plaintiff in error by the Act of 1881, or, in other words, impairs the obligations of a contract contained in that Act, for it has been decided too frequently to admit of such a contention, that only an act adopted subsequently to the making of the contract or the vesting of the rights asserted can furnish ground for such a claim."

In order that our position may now be fully and fairly explained, I quote the assignment in full as set forth on pages 5 and 6 of the brief for plaintiffs in error, upon the motion
4 to dismiss the writ of error and to affirm the judgment. The assignment is as follows:

"The Court erred in holding that Section 3 of Article 10 of the Constitution of the State of Minnesota is not violative of the Fourteenth Amendment to the Constitution of the United States, in that the State of Minnesota, by the provisions of said Section 3, assumes to impair and destroy rights vested in the plaintiffs in error by the special
5 act of the Legislative Assembly of the Territory of Minnesota, approved March 3d, 1853, entitled 'An Act to incorporate the Minnesota Western Railroad Company,' and by the special act of the Legislature of the State of Minnesota, approved March 2d, 1881, entitled 'An Act to amend an Act entitled an Act to amend an Act entitled An Act to incorporate the Minnesota Western Railroad Company,' ap-
6 proved March 3d, 1853, and the act amendatory thereof, approved February 4th, 1870."

The assignment is not intended to set forth a claim that the Minnesota constitution, which became operative in 1858, of itself destroys rights vested in plaintiffs in error BY THE ACT OF 1881, STANDING ALONE. The statement of the assignment is, that the constitutional provision, *applied to this case*, assumes to impair and destroy rights vested in the plaintiffs in error by the territorial act of 1853 AND by the act of 1881. Our position in the case is simply this:

The franchises, privileges and immunities guaranteed to the Minneapolis & St. Louis Railway Company by the
7 special act of 1853 were *perpetuated, confirmed and affirmatively continued by the act of 1881.* It is NOT claimed by the plaintiffs in error that new franchises, privileges or immunities were created or vested by the act of 1881. It IS claimed by the plaintiffs in error that Section 14 of the Act of 1881 (which is set forth in full at page 51 of our original brief), forms a condition and constitutes a part of the contract under which the plaintiffs in error *accepted* the act of 1881, and that the language of the Section referred to expressly and explicitly negatives the presumption that the exemption
8 from double liability was lost or surrendered by the acceptance of the act under which the consolidation was made.

The franchises were *created* and *granted* to the plaintiffs in error by the territorial act of 1853; they were *continued* by the act of 1881. The defendant in error is estopped to say that plaintiffs in error are subject to a constitutional liability under the consolidation authorized by the act of 1881, and at the same time deny them the exemption guaranteed by the language of the act which they accepted. It was intended by this assignment to present our claim of immunity under
9 the original contract embodied in the act of 1853 *and the guarantee of its continuance* by the 14th section of the Act of 1881.

On page 13 of the brief of defendant in error, counsel says:

"In their third assignment, plaintiff in error asserts *expressly* that *the enforcement* of Section 3, Article 10 of the Minnesota Constitution is in violation of the Federal Constitution, in that it impairs the obligation of the contract contained in the act of 1881."

This is a play upon words. By *"the enforcement"* of this constitutional provision, reference is had to the *application* of the provision to the case at bar.

It is familiar law that a law may be constitutional and valid as applied to one state of facts, or one case, and unconstitutional and invalid, as applied to *another* state of facts or another case. It is the application of the constitutional provision to the stockholders of a railroad company created before the constitution was enacted, which I perhaps inaptly termed "the enforcement" of such provision.

The act of 1881 is an amendment to the act of 1853, *expressly preserving and perpetuating the franchises and immunities which accompanied the creation of the corporation.*

It is said by the defendant in error, on page 14 of his brief, that

"It is not alleged by plaintiffs in error that the State through the agents of its legislative or its executive department or of any ministerial officer, or of any individual or corporation acting under its authority, has deprived plaintiffs in error of rights secured by the act of 1881, or that by means of any law passed subsequently to the passage of that act, the State has impaired the obligation of the contract contained in that act; but, in each case, the action complained of as a taking of property, or as an impairment of contract obligation, is the action of the State courts in misconstruing (so they assert) the act alleged to confer the rights or constitute the contract claimed.

That such judicial action cannot constitute a ground of jurisdiction in this court is too well settled to require argument or quotation from authorities."

Again, counsel misapprehends our position. The *law* to which we object is the constitutional provision. Limited to corporations whose franchises were not in existence at the time of its adoption, the provision of the State constitution is valid. Extended to those corporations whose franchises are older than the State constitution, its provisions are, *as to such corporations*, invalid, because it impairs their charter contract. That it was intended to apply to the latter class was the *judicial* question decided by the Supreme Court of Minnesota. *Thus construed*, and extended to the corporation in which the individual plaintiffs in error are stockholders, it impairs the charter contract of the corporation and violates the federal constitution. It is not the *decision* which impairs the contract, it is the *law, the provisions of the State constitution*, which the decision applies and construes, which impairs the contract.

II.

It may be conceded as an abstract proposition that the erroneous construction of a contract by a State court, will not confer jurisdiction on this court, but such concession
14 does not touch the merits of this case. The act of 1853 is our original charter, and constitutes the original contract between the plaintiffs in error and the State of Minnesota. The act of 1881 is an amendment to the act of 1853, so entitled and declared, and as such was accepted. It assumes to perpetuate and continue *all* the original franchises and immunities. This contract, as amended, came before the State courts for construction in the case at bar, *for the first time*. That being true and the construction of the State court bringing the State constitution in conflict with the constitution of the United States, this court is not bound
15 by the construction of the State court, but will construe the contract for itself. This rule applies because the charter contract was accepted before the State constitution was adopted, and because the consolidation agreement was entered into pursuant to the provisions of the Special Act of 1881 before that act had been construed by the State court. Abundant authority to support this proposition will be found at page 23 of the brief of plaintiffs in error on
16 the motion to dismiss and affirm.

The argument of the defendant in error contains this radical fault: It treats the act of 1853 as one contract, and the Act of 1881 as another contract. This is but partially true. The Act of 1881 *creates no franchises;* it perpetuates *existing* franchises; it constitutes a new contract to this extent only—by it, the State agrees with the corporation, that in case it enters into a consolidation agreement pursuant to the terms of the act, and thus technically creates a new corporation, all existing franchises and immunities shall nevertheless be continued and preserved. This contract may not be law-
17 fully impaired, and its impairment also violates the Federal Constitution and is within the second assignment of error.

III.

Again, it is said at page 22 of the brief of the defendant in error:

"Having determined that the Minnesota Western Railroad Company and the Consolidated Company were distinct and independent corporations, it (the Supreme Court of Minnesota) was not called upon to construe the Act of 1853."

This statement is made in support of the claim that the case was decided upon grounds which do not involve
18 the constitutionality of the law.

The argument is plausible, but unsound for two reasons:

1. A finding and decision that the consolidation of the constituent companies created a new corporation, does not avoid the constitutional question, because it is the settled law of Minnesota that existing franchises and immunities may be transmitted by the State Legislature unimpaired, *to a new corporation*, and this was specifically done by the act of 1881.

See Section Fourteen of the act, page 51 of our former brief.

The Decisions supporting this proposition will be found in the brief of the plaintiffs in error on the motion to
19 dismiss and affirm, *pages 13 to 15.*

It is also the general statute law of the State, Page 19 same brief.

The real question is not whether a new *corporation* was created by the consolidation, but whether new FRANCHISES were granted by the act of 1881 and came into existence by the consolidation.

The stockholders in each and all of the constituent companies were exempt from personal liability for corporate debts under their respective charters.

2. The construction of the contract made pursuant to the special act of 1881, and the construction of the contract between the State and the corporation, embodied in the same act, is for this court. If the act is valid as to plaintiffs
20 in error, it is valid as to the State. If it is valid as to the State, our franchises and immunities are continued, and the enforcement of the constitutional provision impairs the obligation of the contract by which they were first granted.

IV.

The Act of 1853 contained the following provision:

"The legislature may at any time amend or alter this act." (*Section 22.*)

This reservation was repealed by the Act of 1870; but while it was still in force the State Constitution was adopted and that instrument contained this provision:

"Each stockholder in any corporation shall be liable to the amount of stock held or owned by him."

It is argued by counsel for defendant in error that the adoption of this constitutional provision, of itself, amounted to an amendment of the charter of the railroad com-
21 pany, valid under the reservation contained in the charter.

It is true that "*In the matter of Oliver Lee & Company's*

Bank, 21 New York," cited by counsel, it was held that the charter of a bank organized under a general banking law was amended by the subsequent adoption of a constitutional provision. *The contrary rule obtains in Minnesota.* The State Supreme Court has held in three cases cited, at page 37 of the brief of plaintiffs in error on the motion to dismiss and affirm, that the contracts embodied in the territorial charters are not affected by constitutional provisions subsequently
22 adopted. This ruling is adhered to by the Supreme Court of the State of Minnesota in the case at bar. Had the State Court held in this case that the adoption of the constitutional provision operated as an amendment to the original charter, the case would have been quickly, and probably finally, disposed of. The opinion of the State Court, however, concedes that the constitutional provision does not affect the original charter, and is apparently based wholly upon the single conclusion that the consolidation agreement created a new corporation. At the time the consolidated company came into existence the provision authorizing the alter-
23 ation and amendment of the Special Charter by the legislature had been repealed and such power did not exist. This proposition advanced by defendant in error is in direct conflict with the adjudication and holding of the Supreme Court of Minnesota in this case and others. The same proposition was advanced by counsel upon the trial of the case in the State Court, but was disregarded by that court.

In conclusion I beg to call attention to the fact that each and every proposition submitted by counsel for defendant in error has been discussed and authorities cited
24 thereon in the brief filed by plaintiffs in error upon the motion to dismiss the writ of error and affirm the judgment. Underlying the whole case and the technical questions of law which have been presented for the consideration of this court, lies the great and controlling proposition that the equities are wholly with the plaintiffs in error. A State, like an individual, is bound, both legally and morally, to the fulfillment of its contracts. That the stockholders in each of the constituent corporations were exempt from personal liability for corporate debts is a conceded fact. That the adoption of the constitutional provision did not, of
25 itself, change the rule or impose upon them such personal liability, is conceded by the Supreme Court of Minnesota in this case. The consolidation agreement, the execution of which is claimed by the defendant in error to have created a new corporation subjected to new, different and more burdensome liabilities, was made only upon the solemn assurance of the State that no existing franchises, privileges, immunities or exemptions possessed by any one of the constituent companies should be lost by reason thereof. The enforcement of the judgment of the Supreme

Court of the State of Minnesota results in the most fla-
26 grant violation of our contract with the State An adjudication by this court affirming that decision would be an approval of a breach of contract. Briefly stated, plaintiffs in error pray that the State of Minnesota, in common with other persons, shall be compelled to act in good faith and fulfill its agreements; while defendant in error comes into court asking the State to repudiate its contract, after it has been accepted and acted upon in good faith.

Respectfully submitted,

ALBERT E. CLARKE,

Attorney for Plaintiffs in Error.